(1) Supreme Court, U.S.
FILED

001347 DEC 1 8 2000

OFFICE OF THE CLERK

No._____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 2000

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NANCY D. JONAS
Petitioner,

v.

UNISUN INSURANCE COMPANY,
ORION AUTO INCORPORATED,
SVALINA, RICHARDSON & LARSON,
and ALEXANDER T. VIGIL,
Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

Nancy D. Jonas
Charles Street
Post Office Box 1563
Beaufort, South Carolina 29901
1-800-791-1558

135 pp

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QUESTIONS PRESENTED

1. Whether in considering the U.S. Magistrate's Order and Recommendation and determining Appellant's Objections were without merit, the District Court judge properly reviewed under Article III and the governing federal law 28 U.S.C. § 636 by appropriate standards and Long v. Lockheed Missile and Space Co., 783 F. Supp. 249 (D.S.C. 1992), Charleston Division, correctly assessing the Magistrate's excessive assumption of authority under those provisions as an Article I judge, 5th Amendment being applicable; important questions of federal law and a conflict of law among the circuits that has not been, but should be settled by this Court.

2. Whether appellate review is derived from 28 U.S.C. § 636; Federal Rules of Civil Procedure, Rule 73(c), Appeal; Federal Rules of Appellate Procedure, Rules 3, 4, and 5.1, including Advisory Committee Notes, 1986 Adoption and 28 U.S.C. § 1254(1) and 28 U.S.C. § 1291 in accord with Catlin v. United States, 324 U.S. 229 (1945) where there is tension with 28 U.S.C. § 1447(d), an important question of federal law that has not been, but should be settled by this Court.

3. Whether The Supremacy Clause of the United States Constitution, Article VI, Clause 2, required the state judge Kemmerlin and the attorneys as officers of the in the first instance to correctly interpret federal law 28 U.S.C. § 1446(d) and the Feral Rules of Procedure where

the Orders and assumption of jurisdiction by the state appellate courts were in conflict with decisions of the Supreme Court of South Carolina and those of the United States Supreme Court; this Court may exercise its supervisory authority to ensure recognition and compliance with federal law where failure to protect constitutional rights is cognizable under 42 U.S.C. § 1983, *et seq*. and the 14th Amendment Sections (1) and (5), Cohen v. Virginia 19 U.S.(6 Wheat.) 264 (1821) and Cooper v. Aaron, 358 U.S. 1 (1958).

PARTIES TO THE PROCEEDING

1. Unisun Insurance Company
   Charleston, South Carolina
   (Parent Company-Orion Capital/Auto, Inc., Englewood, Colorado)
   (Royal Sun Trust Alliance Insurance Co., London, England and Charlotte, NC)

2. Svalina Richardson and Larson, The Svalina Law Firm, Daniel Larson, Esquire
   Beaufort, South Carolina

3. Alexander T. Vigil, *et al.*

OPINIONS AND ORDERS BELOW

The United States Court of Appeals for the Fourth Circuit entered its unpublished opinion on September 20, 2000. A timely Petition for Rehearing/Suggestion for Rehearing *en banc* was denied on November 20, 2000. Copies of these orders appear in the Appendix along with other relevant orders.

JURISDICTIONAL STATEMENT

The Writ of Certiorari comes before the Court for review of the Order and Report and Recommendation of United States District Court entered on December 7, 1999 by the U.S. Magistrate judge Robert S. Carr and the Order of the Honorable Sol Blatt, Jr., Judge of the United States District Court

entered on February 4, 2000. The United States Court of Appeals for the Fourth Circuit, Circuit Judges Niemeyer, Michael, and Traxler dismissed the case in an Unpublished Opinion on September 20, 2000 and entered an Order denying Rehearing/ Suggestion Rehearing/Suggestion for Rehearing *en banc* on October 23, 2000. The case was viewed under 28 U.S.C. § 1447(d) though the Magistrate and District Court judge obtained authority pursuant to 28 U.S.C. § 636 and applicable Federal Rules of Civil and Appellate Procedure which pertains to that statute in which specific appellate procedure is available. The Magistrate's authority for Order in this case was additionally defined by Long v. Lockheed Missile and Space Co., 783 F. Supp. 249 (D.S.C. 1992), Charleston Division. Because of this opinion's national prominence, there may be the presumption that Chief Judge Hawkins' opinion represents the division, if not the Fourth Circuit and is in accord with an earlier decision of the Third Circuit, Giangola v. Walt Disney World Co., 753 F. Supp. 148 (D.N.J.1990). The application of 28 U.S.C. § 1447(d) and Judge Blatt's avoidance of addressing the due process and equal protection issues summarily overruling Petitioner's Objections are a significant abuse the authority granted an Article III judge and legal duty under Article VI, U.S. Constitution. The action threatens to deprive the reviewing courts of appellate jurisdiction in violation of Article III and the 5th and 14th Amendment (1) and (5). Marbury v. Madison, 5 U.S. (1Cranch) 137 (1803) and The Federalist No. 78, Alexander Hamilton are relevant to define judicial power. The jurisdiction for review by Certiorari is available under 28 U.S.C. § 636, Rule 73, FRCP, Rules 3, 4, and 5, FRAP and 28 U.S.C.§ 1254 (1) and 28 U.S.C. § 1291 in accord with Catlin v.

United States, 324 U.S. 229 (1945). In Felker v. Turpin, 518 U.S. 651 (1996), members of the Court suggest there might be other ways for the Supreme Court to review Court of Appeals decisions such as pursuant to the All Writs Act, 28 U.S.C. § 1651. The Court's Commerce Clause jurisprudence and Rico statutes, 18 U.S.C. § 1961, *et seq.* are applicable, Humana Ins., *et al.* v. Forsyth, *et al.*, 523 U.S.___(1999), No. 97-303. The McCarren-Ferguson Act does not block access to Rico. Merchant's Home Delivery Serv., Inc. v. Frank B. Hall & Co., 50 F. 3d 1486 (1995), declared the McCarren-Ferguson Act does not preclude "application of a federal statute prohibiting acts which are also prohibited under a states' insurance laws". The National Association of Insurance Commissioners' "Model Unfair Trade Practices Act, National Association of Insurance Commissioners, Model Laws, Regulations and Guidelines" 800-1 (1995) expresses relevant guidelines. The Supremacy Clause, Article VI, U.S. Constitution authorizes jurisdiction where the Court is the constitutional instrument for implementing Article III and Article VI. Quoting Justice Scalia from a 1995 case, because "the judicial power is one to render dispositive judgments," the federal law (as used) "effects a clear violation of separation of powers".

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Respondent.

On Petition for Writ of Certiorari to the
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Petition for Writ of Certiorari

Petitioner respectfully prays that the Court grant Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit.

JURISDICTIONAL STATEMENT

The Writ of Certiorari comes before the Court for review of the Order and Report and Recommendation of United States District Court entered on December 7, 1999 by the U.S. Magistrate judge Robert S. Carr and the Order of the Honorable Sol Blatt, Jr., Judge of the United States District Court entered on February 4, 2000. The United States Court of Appeals for the Fourth Circuit, Circuit Judges Niemeyer, Michael, and Traxler dismissed the case in an Unpublished Opinion on September 20, 2000 and entered an Order denying Rehearing/ Suggestion Rehearing/Suggestion for Rehearing *en banc* on October 23, 2000. The case was viewed under 28 U.S.C. § 1447(d) though the Magistrate and District Court judge obtained authority pursuant to 28 U.S.C. § 636 and applicable Federal Rules of Civil and Appellate Procedure which pertains to that statute in which specific appellate procedure is available. The Magistrate's authority for Order in this case was additionally defined by Long v. Lockheed Missile and Space Co., 783 F. Supp. 249 (D.S.C. 1992), Charleston Division. Because of this opinion's national prominence, there may be the presumption that Chief Judge Hawkins' opinion represents the division, if not the Fourth Circuit and is in accord with an earlier decision of the Third Circuit, Giangola v. Walt Disney World Co., 753 F. Supp. 148 (D.N.J.1990). The application of 28 U.S.C. § 1447(d) and Judge Blatt's avoidance of addressing the due process and equal protection issues summarily overruling Petitioner's Objections are a significant abuse the authority granted an Article III judge and legal duty under Article VI, U. S. Constitution. The action threatens to deprive the reviewing courts of appellate jurisdiction in violation of

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STATEMENT OF THE CASE

This case was initially brought before the former magistrate for Beaufort County, George B. Brown on September 10, 1996 by the Petitioner in lieu of summarily paying the traffic ticket. The Petitioner felt it was best to establish a record because the Appellee, Alexander T. Vigil, initially requested the authorities not be involved and because a several concerns the Petitioner had about the ticket. The ticket as written by the officer indicated the accident location as being a "county road". The accident occurred at a stop sign just a block away from a shopping area in Beaufort located on Hwy 170 connecting Beaufort with Hilton Head and Hwy 280 leading to Parris Island in Beaufort, rather than a rural location. Further, a square on the ticket designated date of arrest just below date of violation was filled in though the citation did not entail arrest but rather the standard option for court appearance if desired rather than routinely paying the fine. The Petitioner elected to appear in court and also reported the accident to the insurance carrier. Unisun compensated Mr. Vigil $144.23 for a completely new taillight assembly. $55.00 dollars in costs were paid by the petitioner after the hearing. However, some months later, the Petitioner noted a substantial rise in insurance rates. The insurance carrier, then Unisun Insurance Company reported they had been contacted by The Svalina Law Firm, who had become involved with Mr. Vigil to generate a personal injury action in which they sought approximately $9,000.00 but settled for $5,750.00. The Petitioner was never informed and afforded an opportunity to contest these allegations and the settlement. The Svalina Law Firm collaborated with Unisun Insurance Company to obtain $5,750 through

attorney Daniel Larson who alleged "Mr Vigil incurred injuries due to this involving your automobile collision with the rear of his motorcycle.", letter dated August 3, 1998 from Unisun Insurance Company.

The personal injury claim was input into national insurance information banks where this false information circulated in interstate commerce. Both the insurer and the attorney knew this would occur and exhibited a disregard for the effect such information would have on the Petitioner. The company abandoned obligations and compromised Appellant's rights preventing the exercise of lawful options. Unisun Insurance Company allowed this result to be rendered by employee's not competent to apply due process criteria and make legal determinations. The settlement is not premised on an implied covenant of good faith and fair dealing, United States Fidelity and Guaranty Co. v. Peterson, 540 P.2d 1070, 1071 (1975). The "settlement" relieves the Insurer of compliance with insurance law and other applicable law such as Torts. The decision altered substantive contractual and statutory insurance rights. The publication of false information in channels of interstate commerce could substantially affect financial rights. The action was contradictory to the established facts and the Svalina Law Firm and their attorney Mr. Kiker knew or should have known Vigil had a criminal record including a conviction for arson to defraud an insurance company, Case No.: 93GS07-0843: March Term, 1993 and a court ordered psychiatric examination for a period of time at a mental institution when an episode of arson reoccurred, Case No. 94GS07-0636: February, 1994. Mr. Kiker, initial attorney for Svalina Law Firm and Vigil represented in a letter dated September 13, 1999

that Vigil's name was Vihil perhaps so that Petitioner, in reliance on information provided by an officer of the court, would not discover Vigil's criminal background. Appellant indicated that the Officer's Report, State driver records indicated Vigil to be the correct surname but Attorney Kiker never acknowledged with possible correction. The use of the incorrect surname deterred of Vigil's criminal record which is material to the proceedings. Mr. Vigil's driver record indicates disregard of signal or signs, alcohol violations and speeding violations. He has been a licensed driver since 1992.

Another unusual situation involves the action of the United States upon the Petitioner's Motion for Leave to Amend Pleadings. The Petitioner was granted Leave to Amend Pleadings in an Order of the United States Court of Appeals for the Fourth Circuit which was neither dated nor apparently filed. The United States Court of Appeals further used the uncorrected version of Mr. Vigil's surname (Vihil) in the caption of their unpublished opinion decided September 20, 2000. Further, the Beaufort, SC business address appearing on Mr. Kiker's letterhead stationary is 1605 North, P.O. Box 2481. Beaufort phone directory lists Mr. Kiker's office address, 601 Bladen Street, the street address of the Svalina Law Firm, 524-0333.

The records show that the accident occurred at a stop sign. Mr. Vigil signaled his intention to turn right beginning his movement at full throttle. Petitioner with her foot on the brake inched forward, glanced left to evaluate the traffic when Mr. Vigil made a sudden erratic movement and Petitioner in rolling slightly forward tapped his taillight. The light bulb remained

intact but the plastic casing popped off. The traffic ticket indicates virtually no speed and the officer testified that petitioner tapped into the taillight only. Mr. Vigil requested that the Petitioner give him $45.00 for the plastic casing and that police not be involved but the Petitioner felt it was best to establish both a court and insurance record and pursued that course.

PROCEDURAL HISTORY

On August 18, 2000, the Petitioner filed a Complaint in the Court of Common Pleas for the 14th Judicial Circuit of South Carolina (Civil Action No. 99-CP-07-1292), to stop the potential application of the statute of limitations to this proceeding under the State's law. The Complaint alleged fraud, Unfair Trade Practices and due process violations referencing federal law, the Rico statutes and the Commerce Clause as well as insurance law relating to contracts and the federal Unfair Trade Practices Act codified at....., and other law as may be applicable. On September 13, 1999, J. Brent Kiker filed a Motion to Dismiss and for Sanctions noting his representation of the defendants Svalina, Richardson and Larson and Alexander "Vigil" and "will and hereby do move before the Honorable Thomas Kemmerlin, Master in Equity for Beaufort County, or some other judge designated to hear such matters, for an Order as follows: (1) Dismissing all claims raised in the Plaintiff's Complaint against them, pursuant to Rule 12 (b)(6) of the South Carolina Rules of Civil Procedure, for failure to state a claim for which relief may be granted; (2) Dismissing the Complaint against the defendant Alexander "Vigil"("Virgil"), for failure

to properly effect service of process. 'Vihil" was not personally served, nor was any lawful manner of substituted service employed:" (The Petitioner served Svalina, Richardson and Larson, Daniel Larson as attorney and firm that represented him with Unisun Insurance Company, Return receipt dated August 20, 1999.) (3) Granting sanctions against the plaintiff, pursuant to Rule 11 of the South Carolina Rules of Civil Procedure and the Frivolous Proceedings Sanctions Act, for abusing the judicial process and filing pleadings that serve no other purpose than to waste the court's resources and time when the plaintiff knew her claims against these defendant's were groundless. These motions are further based on all applicable statutory and common laws of the State of South Carolina."

On September 28, 1999, the Petitioner removed the case to U.S. District Court, Charleston Division. The Petitioner was told of new procedure where the Court has requested the Clerk's Office submit *pro se* pleadings in the U.S. District Court to Columbia Division for review. Filing was completed on November 23, 1999.

On October 18, 1999, J. Brent Kiker forwarded to the U.S. District Court, a Motion to Remand an d Motion to Dismiss Complaint postmarked and certified October 22, 1999 and for Attorney's fees. Mr. Kiker verifies that no duty of consultation is required pursuant to the Federal Rules of Civil Procedure or Local Rules of Court due to *pro se status* of Petitioner.

On November 1, 1999, E. Mitchell Griffith filed in state court a Motion to Dismiss on behalf of Unisun Insurance Company along with an Affidavit in which

Larry Shifflette states that he is employed as a litigation examiner by Defendant Unisun Insurance Company located at One Southport Circle, Charleston, South Carolina and that among other things he finds"no proper service through the Department of Insurance of a Summons and Complaint in this matter." The Motion to Dismiss seeks an Order on the grounds that service was never perfected on the Defendant Unisun Insurance Company, though the Petitioner affirms the insurer and its parent company has received copy of all pleadings and that state law does not apply as of this date to the federal case." Petitioner finds that Federal law applies at 28 U.S.C. § 1448, "In all cases removed from any State court to any district court of the United States in which any one or more of the defendants has not been served with process or in which the service has not been perfected prior to removal, or in which process served proves to be defective, such process may be completed or new process issued in the same manner as in cases originally filed in such district court."

On November 29, 1999, Scott Maryfield of Kiker & Dodds, P.A. sent Certificate of Service certifying that copies of the Defendants' Svalina, Richardson and Larson and Alexander T. "Virgil" (Vigil) Motions to Dismiss and for Sanctions and Notice of Hearing were mailed to Petitioner noting that these matters are set to be heard before the Honorable Thomas Kemmerlin, Jr., Special Circuit Judge on December 3, 1999, at 1:30 p.m. in Judge Kemmerlin's chambers. 28 U.S.C. § 1446(d) is in effect prohibiting further state proceedings. A letter was written to Clerk of Court for Beaufort County, Gloria Williams calling attention to this docketing error and seek correction. Appellant was not notified if the hearing took place

Despite the sufficiency of the Stay under 28 U.S.C. § 1446(d), Petitioner filed a Motion for Relief in the U.S. District Court on December 2,1999, and an emergency Stay to enjoin the state proceedings on December 3, 1999. 28 U.S.C. § 2283 (1978), Maseda v. Honda Motor Co., 861 F. 2d 1248 (11th Cir.1988), Steamship Co. v. Tugman, 106 U.S. 118,122 (1882); Hyde Park Partners, L.P. v. Connolly, 839 F. 2d 837, 842 (1st Cir. 1988).

The Petitioner applied for Sanctions under 28 U.S.C. § 1927 and Chambers v. Nasco, Inc., 501 U.S. 32, 45 (1991). The U.S. District Court made no response; however, as of the morning of December 3, 1999, the hearing was not docketed.

On December 7, 1999, the senior judge of the U.S. District Court, Judge Blatt, assigned the case to Magistrate Judge, Robert S. Carr, but did not obtain the requisite statutory consent pursuant to 28 U.S.C. § 636. The lack of consent did not allow the Magistrate to direct entry of remand or judgment but rather only a Report and Recommendation. The U.S. Magistrate filed an Order and Report and Recommendation contrary to the statutory and decisional federal law governing the case. The Magistrate applied the Rule 72(b), FRCP, which is prohibited by 28 U.S.C. § 2072 in that this statute which governs federal procedure prohibits the use of a Rule to direct substantive results. 28 U.S.C. § 636; Long v. Lockheed Missile and Space Co., 783 F. Supp. 249 (D.S.C. 1992), Charleston Division in accord with Giangola v. Walt Disney World Co., 753 F. Supp. 148 D.N.J.); and Federal Rule of Civil Procedure, Rule 72 (b) are governing. Local Rules do not support this assumption of authority but

are silent. Because of the national prominence of the Long opinion, there may be the presumption that the opinion of then Chief Judge Hawkins, Charleston Division, represents the District if not the Fourth Circuit. The Magistrate exceeds his authority in attempting to overrule the authority of an Article III judge who wrote that an Order of Remand was dispositive, outside the authority of a magistrate to issue. ("This Court joins that group of courts which hold that a motion to remand is non-dispositive and can be determined by a magistrate judge by final order.")

The authority of a U.S. Magistrate is granted pursuant to 28 U.S.C. § 636. The Magistrate filed an Order and Report and Recommendation against the authority of 28 U.S.C. § 636 (b) (1) (A), " a judge may designate a magistrate to hear and determine any pretrial matter pending before the court, except for Motions for Injunctive relief...to Dismiss for Failure to State a Claim upon which relief can be granted and to involuntarily dismiss an action. 28 U.S.C. § 636 requires a magistrate to perform such duties as are not consistent with the Constitution of the United States and the laws of the United States." Because the magistrate characterizes his Order as non-dispositive, a lower standard of review may be applied which is unconstitutional under Article III and other provisions.

The Order and Report and Recommendation was not served on the Petitioner until January 15, 2000 though the Remand was effectuated on January 13, 2000 and the Docket Sheet closed January 13, 2000. The Petitioner did not receive the certified copy of the Order and Report and Recommendations until January 15, 2000. The Postmark indicated mailing on January

13, 2000. The Notice of Right to File Objections was not included as the Order indicated but rather was requested on January 21, 2000. Timely Objections were submitted to U.S. District Court Judge on January 24, 2000.under the authority of 28 U.S.C. § 636.

Dated January 12, 2000, a letter from state judge Kemmerlin directs, " Dear Mitch and Brent: Draw me an order ruling in your favor, except at this time I do not grant sanctions, even though you may note that Ms. Jonas by representing herself does frequently file foolish and time consuming motions and if she persists sanctions may be forthcoming."

Postmarked January 14, 2000, Attorney Kiker representing the Svalina Law Firm and Mr. Vigil wrote the U.S. District Court renewing his October 18, 2000 Motion to Remand which he based on failure to state a claim on which relief may be granted and to Dismiss (Complaint) before the Magistrate asking the magistrate to act in a manner which is not permitted under the statute.

The District Court Judge issued an Order dated February 4, 2000 where he states, "because this action has been remanded to the state court, this Court has no jurisdiction over the case and no authority to reconsider the December 7, 2000 Order to Remand." "Moreover, even if this court considered the Plaintiff's , it would reaffirm the Report and Recommendation on the merits and adopt it as this Court's Order. Accordingly, it is ordered that the Plaintiff's January 26, 2000 objections are overruled." The U.S. District court judge relied on 28 U.S.C. § 1447(d) to foreclose review. Under 28 U.S.C. § 1446 (c)(4), "the United States district court

in which such notice is filed shall examine the notice promptly. If it clearly appears on the face of the notice and any exhibits annexed thereto that removal should not be permitted, the court shall make an order for summary remand In this case, the court did not issue remand *sua sponte* at the onset and because of assignment under 28 U.S.C. § 636 the jurisdiction of that statute attached which provides its own procedure for appellate review. Further, the Federal Rules of Appellate Procedure, Rules 3,4 and 5.1, FRAP as well as Rule 73, FRCP. Lack of subject matter jurisdiction was not apparent and in fact may proceed under 28 U.S.C. § 1331, *et seq.* and other authority which requires review under the U.S. Constitution, the Fifth and Fourteenth Amendment, (1) and (5).

On February 11, 2000, Harvey McCormick, III filed for attorney Mitch Griffith, Attorney for Unisun Insurance Company an affidavit of non service from the adjuster and stated that "pursuant to your request" referring to an apparent contact from Judge Kemmerlin, "during a motion to Dismiss for lack of service, which was heard by you some time ago." (significant in that the hearing was not attended by Petitioner perhaps on December 3, 1999), Mr. McCormick continues, "I would appreciate it if you would take this into consideration and grant my motion to Dismiss."

By letter dated, February 21, 2000, Attorney J. Brent Kiker writes Judge Kemmerlin with copy to Svalina Law Firm, Alexander "Vihil"(through his attorney) and E. Mitchel Griffith, Esq., Daniel A. Larson, Esq. (Svalina Law Firm), "Dear Judge Kemmerlin, Enclosed is the original order drafted at your request. By copy of this letter, I am sending a

copy of the enclosed order to the Plaintiff and to Mitch Griffith, counsel for the co-defendant Unisun Insurance Co." The Order stated: "This matter came before me on the Defendant's Svalina, Richardson & Larson and Alexander "Virgil's" Motion to Dismiss and Motion for Sanctions. These defendants seek dismissal of the plaintiff's pro se complaint on the grounds that it states no claim against them. A hearing was held and, after hearing arguments (the Petitioner was not present),and considering the pleadings, I conclude that the defendant's Motion should be granted in part and denied in part. The Plaintiff is known to the court to file and prosecute time consuming and frivolous actions. Notwithstanding that, the court diligently read her complaint with an eye towards sustaining the complaint if any cause of action was presented and properly plead therein. I cannot, however, determine a cause of action against these defendants that warrants relief to the plaintiff, even taking her allegations as true. Essentially, the Plaintiff asks this court for damages allegedly suffered because of these defendant's contributions in raising her insurance rates. Specifically, the Plaintiff states that on August 20, 1996, she rear-ended a motorcyclist, the defendant Alexander "Virgil". "Virgil",was according to the Plaintiff, not seriously injured. The Defendant Svalina represented "Virgil" in a claim against the plaintiff. The Plaintiff's insurance carrier, Unisun Insurance Co. negotiated the settlement. According to the plaintiff, "Virgil's" claim was settled for $5,750.00 without her knowledge. Since the accident, her insurance rates have gone up as a result. (Unisun had originally said through its adjuster there would be no increase in the rates). For this she seeks compensation while her complaint characterizes the defendant's conduct as "fraudulent.

The elements of fraud, which must be plead with particularity, are not contained in this Complaint. Additionally, her claims of negligence and breach of fiduciary duty are directed towards Unisun alone, not Svalina and "Virgil". Accordingly, no cause of action has been stated against the moving defendants," Footnote: Of course, no cause of action for negligence or breach of fiduciary duty may be stated against the moving defendants because there is no legal duty, in tort or otherwise, owed to a negligent party in a car wreck by the victim or his attorney. These defendants simply settled a negligence action with the plaintiff through her insurer. Any damage resulting to the plaintiff, if the settlement was not in her best interest, should be dealt with between her and her insurer. That issue is not before me and I decline to comment on the merits of plaintiff's claims against Unisun. The text of the draft continues, "The plaintiff's complaint does not state a cause of action for which relief may be granted and I therefore dismiss the action against the moving defendants. However, I deny the defendant's Motion for Sanctions. I will, however, consider this Order as notice to the plaintiff of the requirements of Rule 11...and caution her with respect to future filings with this Court."

On February 28, 2000, Judge Kemmerlin directed the Order be filed. By the Federal Rules of Civil Procedure.

On February 14, 2000, the Petitioner filed Notice of Appeal to the U.S. Court of Appeals for the Fourth Circuit with the U.S. District Court at Charleston as required

The Appeal was docketed on February 29, 2000.

The Petitioner was asked to file an Informal Brief on March 24,2000.

On March 9, 2000, the District Court ordered the file returned to the U.S. District Court "so that it may be sent to the Clerk of the Fourth Circuit Court of Appeals, by Order of Judge Blatt.

The Charleston firm of Nexson, Pruet, Jacobs Pollard and Robinson, LLP, David L. Parrish and Susan Taylor Wall, filed a Motion of Defendant-Appellee Svalina, Richardson & Larson to Dismiss Appal Based on Lack of Jurisdiction on March 28, 2000. The Motion substantially relies on the invalid Order of state Judge Kemmerlin filed February 28,2000 and it is believed this firm speaks for U.S. District Court Judge Sol Blatt, Jr.

The U.S. Court of Appeals for the Fourth Circuit requests the Petitioner file a Response to Appellees' Svalina, Richardson & Larson's Motion to Dismiss before April 10, 2000., even if there is no objection and the Petitioner complied with a timely Reply in opposition on April 8, 2000.

Dated April 26, 2000, J. Brent Kiker filed a Notice of Appearance with the U.S. Court of Appeals on behalf of Alexander T. "Vihil". Response was required by 4/3/00. No copy was provided the Petitioner until requested.

On April 17, 2000, Petitioner was mailed Judge Kemmerlin's Motion Roster for Beaufort County (17

pages). Entry 46 showed that J. Brent Kiker had obtained scheduling for Sanctions on behalf of Svalina, Richardson & Larson against Nancy D. Jonas for May 3, 2000 at 2:00 P.M.

On May 1, 2000, the Petitioner filed a Motion to Enjoin Proceedings in state court and a Motion to Recuse Judge Kemmerlin. The U.S. Court of Appeals for the Fourth Circuit provided no response.

On May 17, 2000, Chief Administrative Judge of the 14th Judicial Circuit of South Carolina responded "pursuant to Judge Blatt's Order of March 9,2000, the file was returned to the Clerk of Court of the Fourth Circuit of Appeals which currently divests this court of jurisdiction". J. Ernest Kinard, Jr., Chief Administrative Judge.

On June 14, 2000, the Petitioner submitted Motion for Leave to Amend and Motion to Amend with regard to Alexander T. "Vihil" to "Vigil".

The United States Court of Appeals for the Fourth Circuit by undated Order postmarked June 20,2000 granted the Petitioner's Motion to Amend but did not file and date its Order. Further , the unpublished Opinion of the Court left the name "Vihil" in its caption.

On June 21,2000, attorney E. Mitchel Griffith wrote the U.S. Court of Appeals for the Fourth Circuit, "Please be advised that I have been retained to represent Unisun Insurance Company in regard to the above captioned matter. While we are receiving copies of these motions, Unisun Insurance Company has not been

properly served as a defendant and there was a Motion to Dismiss filed. Please forward me any documentation so that I may note my representation as counsel for this party." Copy to J. Brent Kiker. The Motion to Dismiss referred to was one filed in state court. Mr. Griffith has never filed any motion or pleading of any kind in federal court and waiver is imposed. Subsequently the U.S. Court of Appeals for the Fourth Circuit, Deputy Clerk Jean St. John, responds sending a Notice of Appearance form on June 26, 2000, addressing the response to: Ernest Mitchell Griffith , Esq., Davis, Tupper, Grimsley and Seelhoff, 155 Sea Island Parkway, P.O.Box 2055, Beaufort, South Carolina 29901. The significance of this address and names is that this is actually the business address of the county attorney who has been active with the Davis, Tupper firm in another U.S. Supreme Court case which the Petitioner submitted which by reference is incorporated. The Attorney Seelhoff left the Davis, Tupper firm for the firm of the county attorney before conclusion of his representation in the earlier case. Attorney Tupper represented Vigil in a case involving the arrest of Vigil others and for a city ordinance violation.

U.S. District Court Judge Sol Blatt, Jr. filed an Order on July 26, 2000 upon his own Motion which reflected the name change for Alexander T. "Vihil" to "Vigil".

In Unpublished Opinion, the U.S. Court of Appeals for the Fourth Circuit granted the Defendant's Motion to Dismiss for Lack of Jurisdiction *per curiam* on September 20, 2000.

The Dismissal included Unisun Insurance Company and Orion Auto, Incorporated who never filed any motion in federal court seeking dismissal.

On October 4, 2000, the Petitioner submitted Petition for Rehearing/Suggestion for Rehearing *en banc* along with a Bill of Costs. The firm Nexson Pruet filed Return to Petitioner's Petition for Rehearing/Suggestion for Rehearing *en banc* on behalf of Svalina, Richardson & Larson on October 6, 2000, despite Return not being allowed unless requested by the Court, FRAP.

The U.S. Court of Appeals for the Fourth Circuit denied Petitioner's Motion for Rehearing /Suggestion for Rehearing *en banc* on October 23, 2000.

The Mandate issued October 31, 2000 on the judgment of this Court dated 9/20/00 taking effect October 31, 2000.

ARGUMENT

1. **Whether in considering the U.S. Magistrate's Order and Recommendation and determining Appellant's Objections were without merit, the District Court judge properly reviewed under Article III and the governing federal law 28 U.S.C. § 636 by appropriate standards and Long v. Lockheed Missile and Space Co., 783 F. Supp. 249 (D.S.C. 1992), Charleston Division, correctly assessing the Magistrate's excessive assumption of authority under those**

provisions as an Article I judge, 5th Amendment being applicable; important questions of federal law and a conflict of law among the circuits that has not been, but should be settled by this Court.

The authority of a United States Magistrate is granted pursuant to 28 U.S.C. § 636 as well as relevant decisional law and Federal Rules of Procedure. Local Rules are silent to the issue in this instance of the Remand being considered dispositive beyond the authority of the Magistrate to grant, particularly absent consent. A Magistrate's exercise of this authority must be consistent with judicial power granted by the U.S. Constitution to an Article I judge which is distinguishable the authority granted an Article III judge of a U.S. District Court. In this instance and territory, the Magistrate's authority is governed by Long v. Lockheed Missile and Space Co., 783 F. Supp. 249 (D.S.C.), Charleston Division and Rule 72 (b), FRCP, in accord with Third Circuit case Giangola v. Walt Disney World Co., 753 F.Supp.148 (D.N.J. 1990). Those cases have national standing for the view that Remand is dispositive, excepted under 28 U.S.C. § 636 from those matters which a magistrate may consider. The view is particularly relevant here because the Order of Chief Judge Hawkins, an Article III judge, Charleston Division, is not subject to overrule by an Article I judge. Such exercise of authority is inconsistent with the U.S. Constitution and the standard of review mandated by the Statute to ensure proper review of matters "inherently judicial" and to preserve the doctrine of separation of powers. The District Court Judge's Order in which he finds that the Appellant's Objections raising these issues were without merit and

his application of the lesser standard of review is an abuse of discretion in violation of Article VI, U.S. Constitution and the 14th Amendment. The lack of consent poses due process problems under both the 5th and 14th Amendments. A federal court is not bound by the parties' characterization of a case or its appropriate parties. The U.S. Magistrate's statement, ("This Court joins that group of courts which hold that a motion to remand is nondispositive and can be determined by a magistrate judge by final order.") is indicative of the lack of proper consideration under the controlling authority referenced above. These issues raise substantial questions of constitutional and federal law because of the improbability of meaningful district court review in violation of due process and equal protection rights and Article III. Some federal court must exist to hear cases and controversies specified under Article III. The district court judge does not properly distinguish the powers and responsibilities delegated to an Article III judge under the Constitution with those delegated to an Article I judge affecting the proper exercise of jurisdiction and application under Article III and Article VI. In Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 458 U.S. 50, 86, n.39 (1982). Justice Brennan stated "the requirements for the exercise of judicial power must be met at all stages of adjudication". The Supreme Court in its governance of Article III courts has found that Article III courts must be able to decide *de novo* all questions of law, constitutional issues, and jurisdictional facts, St. Joseph's Stockyards Co. v. United States, 298 U.S. 38, 84 (1936), (J.Brandeis, concurring).

Justification for Removal exists pursuant to 28 U.S.C. § 1446(b) which provides a petition for Removal may be filed within (30) days of when it may be ascertained that the case is one which is or has become removable. Henniford v. American Motors Sales Corporation, 471 F.Supp. 328 (D.S.C.1979). Other authority allows the time period to be extended is where there is good cause, Martropico Compania Navierra S.A., 478 F. Supp. at 1038, or extraordinary circumstances, Gray v. Permanent Mission of the People's Republic of the Congo to the United Nations, 443 F. Supp. 816 821 (2d Cir. 1978). Removal jurisdiction originally was available to both a plaintiff and a defendant. Although, removal jurisdiction is not expressly mentioned in Article III, where Article III defines the matters that federal courts may hear, it is silent as to the procedures that may be used to initiate federal court jurisdiction. Federal jurisdiction exists if there is diversity of citizenship under 28 U.S.C. § 1332 or if there is federal question jurisdiction under 28 U.S.C. 1331. Federal question jurisdiction is available when the case arises under the Constitution, the laws of the United States or its treaties. A case arises under federal law if it is based on a course of action created by federal law. In Osborn v. United States, 22 U.S. (9 Wheat) 247, 823 (1824), Chief Justice Marshall wrote for the Court, for purposes of Article III, there is a federal question wherever federal law is a potential ingredient of the litigation. The Court then explained that under the Constitution a case arises under federal whenever federal law "forms an ingredient of the original cause…[even though] other questions of fact or law may be involved in it." Federal court jurisdiction to hear suits under 42 U.S.C. § 1983, *et seq.*, exists under the general federal question jurisdictional statute,

28 U.S.C. § 1331 pursuant to 28 U.S.C. §1343(3) which grants to redress violation of federal laws that provide for the equal protection of citizens. The enforcement provisions of 42 U.S.C. § 1985(3) and the 14th Amendment, § 5 are relevant preemptive provisions. Pendent jurisdiction is expressly authorized by 42 U.S.C. § 1983, *et seq*., and the authorization permits the case to be tried in the federal forum.

The district court remanded the case on February 3, 2000, not offering proper review as an Article III Judge as required by the governing statute, 28 U.S.C. § 636 and applicable Federal Rules of Civil and Appellate Procedure. The state appellate courts, the Appellees and their attorneys continued the course of disregard of exclusive federal jurisdiction inclusive of federal law and procedure, unnecessarily increasing Appellant's costs and efforts. Later the court, by Order filed March 9, 2000, recalled the file from state court to forward to the U.S. Court of Appeals for the Fourth Circuit. Because the Appellee Unisun Insurance Company/Orion Auto, Inc. did not raise or respond to any relevant issues in federal court, or file any pleadings under 28 U.S.C. § 1447(c), waiver is imposed upon any jurisdictional defect that might have been addressed. Under 28 U.S.C. § 1446(c)(4),

> the United States district court in which such notice is filed shall examine the notice promptly. If it clearly appears on the face of the notice and any exhibits annexed thereto that removal should not be permitted, the court shall make an order for summary remand. In this case, the court did not issue remand *sua sponte.*

The U.S. District Court and the state courts have acted in a way which conflicts with federal law and the U.S. Consitution as to call for the exercise of this Court's supervisory powers under Article III and Article VI, U.S. Constitution.

2. **Whether appellate review is derived from 28 U.S.C. § 636; Federal Rules of Civil Procedure, Rule 73(c), Appeal; Federal Rules of Appellate Procedure, Rules 3, 4, and 5.1, including Advisory Committee Notes, 1986 Adoption and 28 U.S.C. § 1254(1) and 28 U.S.C. § 1291 in accord with Catlin v. United States, 324 U.S. 229 (1945) where there is tension with 28 U.S.C. § 1447(d), an important question of federal law that has not been, but should be settled by this Court.**

The Magistrate's Act codified 28 U.S.C. § 636 provides in pertinent part, (b),(C),(3), a magistrate may be assigned such additional duties as are not inconsistent with the Constitution and laws of the United States; (c)(2) If a magistrate is designated to exercise civil jurisdiction under paragraph (1) of this subsection, the clerk of court shall, at the time the action is filed, notify the parties of the availability of a magistrate to exercise such jurisdiction. The decision of the parties shall be communicated to the clerk of court. Thereafter, either the district court judge or the magistrate may again advise the parties of the availability of the magistrate, but in doing so, shall also advise the parties that they are free to withhold consent without adverse substantive consequences. Rules of court for the reference of civil matters to magistrates shall include procedures to protect the voluntariness of

the parties'consent; (c)(3) Upon entry of judgment in any case referred under paragraph (1) of this subsection, an aggrieved party may appeal directly to the appropriate United States court of appeals from the judgment of the magistrate in the same manner as an appeal from any other judgment of a district court. The consent of the parties allows a magistrate designated to exercise civil jurisdiction under paragraph (1) of this subsection to direct the entry of a judgment of the district court in accordance with the Federal Rules of Civil Procedure. Nothing in this paragraph shall be construed as a limitation of any party's right to seek review by the Supreme Court of the United States.

28 U.S.C. § 1254(1): Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods: (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

28 U.S.C. § 1291: The Courts of Appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction from all final decisions of the district courts of the United States, except where a direct review may be had in the Supreme Court.

Rule 73(c), Federal Rules of Civil Procedure, FRCP. Appeal. In accordance with 28 U.S.C. § 636(c)(3), appeal from a judgment entered upon the direction of a magistrate judge in proceedings under this rule will lie to the court of appeals as it would from a judgment of the district court;

Rule 3, Federal Rules of Appellate Procedure, FRAP. Appeals from judgments and orders of District

Courts. An appeal permitted by law as of right from a district court to a court of appeals must be taken by filing a notice of appeal with the clerk of the district court within the time allowed by Rule 4.

Rule 4, Federal Rules of Appellate Procedure, FRAP. (a) (1) Except as provided in paragraph (a)(4) of this Rule, in a civil case in which an appeal is permitted by law as of right from a district court to a court of appeals the notice of appeal required by Rule 3 must be filed with the clerk of the district court within 30 days after the date of entry of the judgment or order appealed from.

Rule 5.1, Federal Rules of Appellate Procedure, FRAP. Advisory Committee Notes, 1986 Adoption. When the initial appeal is taken to the district court, the statute provides for a second discretionary appeal to the court of appeals.

These provisions are in tension with 28 U.S.C. § 1447 (d). An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to 28 U.S.C. § 1443 of this title shall be reviewable by appeal or otherwise.

Remand is sometimes regarded as interlocutory rather than a final for purposes of review. Where this is the case, exception to review is provided under the Collateral Order Doctrine and its federal case law. In this instance, the case is more appropriately reviewed under 28 U.S.C. § 1291 in accord with Catlin v. United States, 324 U.S. 229 (1945), and other applicable cases.

Humana Ins., *et al.* v. Forsyth, *et al.*, 523 U.S. _____(1999), No. 97-303 the finding that the McCarren-Ferguson Act does not bar application of the Rico is relevant and applicable hereas is the Federal Unfair Trade Act. The Commerce Clause jurisprudence of this Court provides superceding authority under the U.S. Constitution.

This tension poses an important question of federal law that has not been, but should be settled by this Court.

3. **Whether The Supremacy Clause of the United States Constitution, Article VI, Clause 2, required the state judge Kemmerlin and the attorneys as officers of the in the first instance to correctly interpret federal law 28 U.S.C. § 1446(d) and the Federal Rules of Procedure where the Orders and assumption of jurisdiction by the state appellate courts were in conflict with decisions of the Supreme Court of South Carolina and those of the United States Supreme Court; this Court may exercise its supervisory authority to ensure recognition and compliance with federal law where failure to protect constitutional rights is cognizable under 42 U.S.C. § 1983, *et seq.* and the 14th Amendment Sections (1) and (5), Cohen v. Virginia 19 U.S.(6 Wheat.) 264 (1821) and Cooper v. Aaron, 358 U.S. 1 (1958).**

The case was filed in the United States District Court, Charleston Division, on September 28, 2000 and officially on November 23, 1999, because of Court

mandated review in Columbia Division. The civil action became governed exclusively by federal law immediately effectuating the stay of all state court proceedings under 28 U.S.C. § 1446 (d). The state court judge, Thomas Kemmerlin, Jr., Master-in-equity, Special Circuit Judge by Appointment, acted knowingly in defiance of this federal law by continuing the proceedings in state court which federal law expressly prohibited. The same date, Judge Kemmerlin directed the clerk of court file his Order dated February 28, 2000.

Relevant constitutional law to these actions is The Supremacy Clause, Article VI,

Clause 2 This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary not withstanding.

Clause 3: The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by oath or Affirmation, to support this Constitution

The State Court Judge Kemmerlin failed to convey in his Order that a United States District Court had exclusive jurisdiction so that his Order was void *ab initio*. Under the federal law presented, the Court had defined duties under Article VI, U.S. Constitution. This duty was enhanced because the S.C. Supreme Court interpreted 28 U.S.C. § 1446(d) in Davis v. Davis, 229

S.E.2d 847 (1976). Also, there are applicable decisions of the Supreme Court of the United States. The Supreme Court of South Carolina issued an Order of Dismissal dated June 12, 2000. The Court's issuance of the Order dated February 28, 2000 12, 2000 is unconstitutional. Cohens v. Virginia, 19 U.S. (6 Wheat.) 264 (1821) and Aaron v. Cooper, 358 U.S. 1 (1958) and Article VI, Clause 2 and Clause 3, U.S. Constitution are relevant and applicable case law under which the Court may take appropriate action.

Under 28 U.S.C. § 1446(d), the case proceeded in state courts from February 28, 2000 despite lack of jurisdiction. The U.S. District Court judge abdicated his authority and abused discretionary power as an Article III judge allowing the U.S. Magistrate excessive authority as an Article I judge. Proper review under statutory, decisional and constitutional laws was not afforded depriving the Petitioner of due process and equal protection under the law. The Unpublished Opinion of the U.S. Court of Appeals for the Fourth Circuit dismissing Petitioner's Appeal and the case effectuating remand was not properly determined under the correct authority authorizing review as stated above including Pacor. Allowing the attorney to file Notice of Appearance in the Court of Appeals and including Unisun/Orion in the disposition upon the Motion filed only in state court that had no jurisdiction represents an error that should invalidate this determination.

Certiorari should be granted because of the significant disregard for the U.S. Constitution and the laws of the United States as to call for this Court's supervisory powers under Article VI, U.S. Constitution.

CONCLUSION

For any one of the issues presented in this Petition, all raising important questions of federal law, Certiorari should be granted to the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

Nancy D. Jonas

Nancy D. Jonas,
Petitioner, *pro se*

February 21, 2001
Beaufort, South Carolina

No._____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 2000

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NANCY D. JONAS
Petitioner,

v.

UNISUN INSURANCE COMPANY; ORION AUTO INCORPORATED; SVALINA, RICHARDSON & LARSON; ALEXANDER T. VIGIL,
Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit

APPENDIX

Nancy D. Jonas
Charles Street
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Beaufort, South Carolina 29901
1-800-791-1558

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Appendix O	Letter from J. Brent Kiker to the Honorable Thomas Kemmerlin, Jr., re: Order drafted at his request re: Motion to Dismiss and Motion for Sanctions, with Order attached, dated February 21, 2000	*49a-52a*
Appendix P	Order of U.S. District Court instructing Clerk of Court of Beaufort County to return file to U.S. District Court, filed March 9, 2000	*53a*
Appendix Q	Defendants Motion to Dismiss Appeal, dated March 28, 2000	*54a-57a*
Appendix R	Appellant's Response in Opposition, dated April 4, 2000	*58a-62a*

Appendix S	Motion Roster for Beaufort County w/cover letter dated April 17, 2000 for Motion hearings May 3 thru 5 - Roster shows Nancy D. Jonas v. Svalina, Richardson & Larson at #46 scheduled for May 3 at 2:00	*63a-65a*
Appendix T	Letter of Representation of Unisun Insurance Company to Patricia O'Conner from E. Mitchell Griffith, dated June 21, 1999	*66a*
Appendix U	Letter from U.S. District Court of Appeals for 4th Circuit to E. Mitchell Griffith forwarding counsel of record form	*67a*
Appendix V	Order of U.S. District Court granting Appellant's Motion for leave to amend and Motion to Amend Caption, filed July 26, 2000	*68a-69a*
Appendix W	Unpublished Opinion of U.S. Court of Appeals granting Defendant's Motion to Dimsiss for lack of jurisdiction, dated September 20, 2000 District Court granting Appellant's Motion for leave to amend and Motion to Amend Caption, filed July 26, 2000	*70a-71a*

Appendix X	Order of U.S. Court of Appeals for the 4th Circuit denying Appellant's Petition for Rehearing and Rehearing En Banc, filed 10/23/00	*72a*
Appendix Y	Mandate of U.S. Court of Appeals for 4th Circuit, filed October 31, 2000	*73a*
Appendix Z	Constitutional Provisions, Statutes and Rules Involved	*74a-80a*

UNIFORM TRAFFIC TICKET

U 327899
Issued to: Nancy D. Jonas
Issued by: J. C. Myers

dated 8/20/96

Charge: Improper Start from Stop

State of South Carolina	)	In the Court of Common Pleas
	)	
County of Beaufort	)	Civil Action No.: 99-CP-07-1292
Nancy D. Jonas,	)	
vs.	)	MOTION TO DISMISS AND
Svalina, Richardson &	)	MOTION FOR SANCTIONS
Larson, Alexander T. Virgil,	)	
and Unisun Insurance Co.,	)	
Defendants.	)	

YOU WILL PLEASE TAKE NOTICE that the Defendants, Svalina, Richardson & Larson (and Daniel A. Larson, Samuel S. Svalina, Samuel L. Svalina and the Svalina Law Firm to the extent that any claims were made against them) and Alexander Vihil (improperly named "Virgil" in the Complaint), by and through their undersigned counsel, will and hereby do move before the Honorable Thomas Kemmerlin, Master-In-Equity for Beaufort County, or some other judge designated to hear such matters, for an Order as follows:

(1) Dismissing all claims raised in the plaintiff's complaint against them, pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure, for failure to state a claim for which relief may be granted;

(2) Dismissing the complaint against the Defendant Alexander Vihil ("Virgil"), for failure to properly effect service of process. Vihil was not personally served, nor was any lawful manner of substituted service employed; and

(3) Granting sanctions against the Plaintiff, pursuant to Rule 11 of the South Carolina Rules of Civil Procedure and the Frivolous Proceedings Sanctions Act, for abusing the judicial process and filing frivolous

pleadings solely to harass and embarrass the parties, and for filing pleadings that serve no other purpose than to waste the court's resources and time when the plaintiff knew her claims against these defendants were groundless.

These motions are further based on all applicable statutory and common laws of the State of South Carolina.

KIKER & DOUDS, P.A
s/J. Brent Kiker
1606 North Street
Post Office Box 2481
Beaufort, South Carolina 29901
(843) 986-1000
(843) 986-1002

Beaufort, South Carolina
September 13, 1999

State of South Carolina)		In the Court of Common Pleas
)		
County of Beaufort)		Civil Action No.: 99-CP-07-1292
Nancy D. Jonas,)		
vs.)		
Svalina, Richardson & Larson,)		RULE 11 VERIFICATION
Alexander T. Virgil, and)		
Unisun Insurance Co.,)		
Defendants.)		

I, J. Brent Kiker, attorney for the Defendants Svalina, Richardson & Larson and Alexander Virgil, hereby certify that consultation with the opposing party is not required because this is a motion to dismiss and because the plaintiff is proceeding *pro se.*

s/J. Brent Kiker

Beaufort, South Carolina
September 13, 1999

GRIFFITH & SADLER, P.A.
ATTORNEYS AT LAW
600 Monson Street
Post Office Drawer 570
Beaufort, South Carolina 29901-0570
E. Mitchell Griffith
Nancy D. Sadler
Mary E. Sharp* (843) 521-4242 Telephone
Harvey W. McCormick, III (843) 521-4247 Facsimile
*Also Admitted in N.C. Writer's e-mail: hwm@gandspa.com

November 1, 1999

The Honorable Gloria G. Williams
Clerk of Court for Beaufort County
Post Office Drawer 1128
100 Ribaut Road
Beaufort, South Carolina 29901

Re: Nancy D. Jonas vs. Svalina, Richardson, and Larson, Alexander T. Virgil, and Unisun Insurance Co., Civil Action No. 99-CP-07-1292
G&S File : 4063

Dear Gloria:

Please find enclosed the original and one (1) copy of an *Affidavit* in support of the Defendant, Unisun Insurance Co.'s Motion to Dismiss in the above-captioned matter. I would appreciate your filing the original and returning a clocked copy to me in the self-addressed, postage-paid envelope I have provided. By copy of this letter to the Plaintiff and to counsel of record, I am forwarding a copy of the same to them.

If you have any questions regarding this matter, please do not hesitate to contact me.

With kindest regards, I remain

Yours very truly,
s/Harvey W. McCormick, III
HWM/als
Enclosures
cc/enc.: Nancy D. Jonas
J. Brent Kiker, Esquire
The Honorable Thomas Kemmerlin, Jr.

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA

Nancy D. Jonas,	) C/A No.
Plaintiff,	)
vs.	) MOTION TO REMAND
Unisun Insurance Co.;	) AND MOTION TO
Svalina, Richardson & Larson;	) DISMISS COMPLAINT
and Alexander T. Vihil,	)
Defendants.	)
	)

PLEASE TAKE NOTICE that the Defendants, Svalina, Richardson & Larson (and Samuel L. Svalina, Samuel S. Svalina and Daniel A. Larson to the extent any claims against them personally have been made) and Alexander Vihil (designated as "Virgil" and "Vihil" in the Plaintiff's Removal Petition and Complaint) will and hereby do move before this Honorable Court for an Order remanding this case to the Beaufort County Court of Common Pleas, Beaufort, South Carolina and dismissing the Second Complaint against the defendants based on the following:

AS TO THE IMPROPER REMOVAL:

(1) The Plaintiff brought this action in the Beaufort County Court of Common Pleas. She is now attempting to remove this matter; however a **Plaintiff** is not entitled to removal. **Defendants** have the right to removal in cases of diversity of citizenship or federal questions jurisdiction pursuant to 28 U.S.C. § 1441. Here, no defendant has sought to remove this matter. There is no diversity of citizenship as evidenced by the Plaintiff's Complaint. The Plaintiff has not raised a federal claim. The amount in controversy does not exceed $75,000.

(2) The Defendants are entitled to an award of attorney's fees and costs as a result of the Plaintiff's improvident removal of this action. This award is authorized by, and appropriate under, 28 U.S.C. § 1447.

AS TO THE PLAINTIFF'S COMPLAINT:

(1) The Defendants have not been properly served in this action. The Plaintiff is attempting to institute a new action and she has served the attorney for the Defendants. These Defendants have not been personally served and no proper method of substitute service has been employed.

(2) There is another action concerning the exact subject matter and the same parties in another court; specifically, in the Beaufort County Court of Common Pleas, Case Number 99-CP-07-1292.

(3) The Complaint fails to state a claim for which relief may be granted and should therefor be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(6).

(4) This Court lacks subject matter jurisdiction over the claims contained in Plaintiff's Complaint.

Accordingly, these defendants move for a remand and/or dismissal of the Plaintiff's claims for the reasons set forth herein.

NO MEMORANDUM IS BEING SUBMITTED HEREWITH BECAUSE THE GROUNDS ARE FULLY SET FORTH AND REQUIRE NO FURTHER BRIEFING.

KIKER & DOUDS, P.A
s/J. Brent Kiker
1606 North Street
Post Office Box 2481
Beaufort, South Carolina 29901

(843) 986-1000
(843) 986-1002

Beaufort, South Carolina
October 18, 1999

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA

Nancy D. Jonas, Plaintiff,	)	C/A No.
vs.	)	VERIFICATION
Unisun Insurance Co.;	)	REQUIRED BY
Svalina, Richardson & Larson;	)	LOCAL RULE 7.02
and Alexander T. Vihil,	)	
Defendants.	)	
	)	

I have not consulted with the opposing party prior to filing the Defendant's Motion to Dismiss and/or Remand. The opposing party is a *pro se* litigant, and no duty of consultation is required pursuant to the Federal Rules of Civil Procedure or Local Rules of Court.

KIKER & DOUDS, P.A
s/J. Brent Kiker
1606 North Street
Post Office Box 2481
Beaufort, South Carolina 29901
(843) 986-1000
(843) 986-1002

Beaufort, South Carolina
October 22, 1999

KIKER & DOUDS, P.A.
Attorneys at Law

The Ledger Building
1605 North Street
Post Office Box 2481
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843-986-1000 (Telephone)
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Argent Square
Highway 17 Number E-3
Post Office Box 2000
Hardeeville, SC 29927

843-784-2054 (Telephone)
843-784-2055 (Facsimile)

J. Brent Kiker
Anne S. Douds*
*Admitted to SC & GA Bar

November 29, 1999

Ms. Nancy D. Jonas
Charles Street
Post Office Box 1563
Beaufort, SC 29901

Re: Jonas v. Svalina, Richardson & Larson, et al.
Case No.: 99-CP-07-1292

Dear Ms. Jonas:

Enclosed please find copies of the Defendant Svalina, Richardson & Larson's Motion to Dismiss and for Sanctions and a Notice of Hearing. Please note that these matters are set to be heard before the Honorable Thomas Kemmerlin, Jr., Special Circuit Judge on December 3, 1999 at 1:30 p.m. The hearings on these matters will be held in Judge Kemmerlin's chambers on the first floor of the Beaufort County Courthouse.

Sincerely yours,
s/Scott M. Merrifield
:lom
enclosures

State of South Carolina	)	In the Court of Common Pleas
	)	
County of Beaufort	)	Civil Action No.: 99-CP-07-1292
Nancy D. Jonas,	)	
vs.	)	
Svalina, Richardson & Larson,	)	NOTICE OF HEARING
Alexander T. Virgil, and	)	
Unisun Insurance Co.,	)	
Defendants.	)	

TO: NANCY D. JONAS, *Pro Se Plaintiff*
E. MITCHELL GRIFFITH, ESQ., Attorney for Unisun Insurance Company

PLEASE TAKE NOTICE that the Defendants' Svalina, Richardson & Larson and Alexander T. Virgil's Motions to Dismiss and for Sanctions will be heard before the Honorable Thomas Kemmerlin, Jr., at 1:30 p.m. on December 3, 1999 at the Beaufort County Courthouse.

s/Scott M. Merrifield

November 29, 1999
Beaufort, South Carolina

State of South Carolina	)	In the Court of Common Pleas
	)	
County of Beaufort	)	Civil Action No.: 99-CP-07-1292
Nancy D. Jonas,	)	
vs.	)	
Svalina, Richardson & Larson,	)	CERTIFICATE OF
Alexander T. Virgil, and	)	SERVICE
Unisun Insurance Co.,	)	
Defendants.	)	
	)	

I, Scott M. Merrifield, of Kiker & Douds, P.A., do hereby certify that on November 29, 1999, I placed copies of the Defendants' Svalina, Richardson & Larson and Alexander T. Virgil Motions to Dismiss and For Sanctions and Notice of Hearing in the United States Mail, first class, postage prepaid, to the following:

Ms. Nancy D. Jonas
Charles Street
Post Office Box 1563
Beaufort, SC 29901

s/Scott M. Merrifield

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA

Nancy D. Jonas, Plaintiff, vs. Unisun Insurance Co.; Svalina, Richardson & Larson; and Alexander T. Vihil, Defendants.	) C/A No. 9:99-3869-08AJ))))))	Order and Report and Recommendation Filed December 7, 1999

The above-captioned case was removed to the United States District Court for the District of South Carolina by the *pro se* plaintiff in a state court action. The underlying case in state court was an action filed by the plaintiff for breach of contract, breach of fiduciary duty, and fraud against Unisun Insurance Company, Svalina, Richardson, and Larson, and Alexander T. Vihil, defendants. The plaintiff has paid the $150.00 filing fee for removing a case to federal court.

In her notice of removal the plaintiff contends the claims she raises in her state court case "arise under the Constitution of the United States and its federal laws and regulations and (are) suitable for the jurisdiction of this (District) Court." *See* Notice of Removal @ 1.

Discussion

A ***defendant*** in a case in a state court may remove that case to a federal district court only if the state court action could have been originally filed in a federal district court. 28 U.S.C. § 1441. Generally, a case can be originally filed in a federal district court if there is diversity of citizenship under 28 U.S.C. § 1332 or if there is so-called "federal question" jurisdiction under 28 U.S.C. § 1331.

Various federal courts have held that the removal statutes are to be constued against removal jurisdiction, and in

favor of remand. *See, e.g.,* Cheshire v. Coca-Cola Bottling Affiliated, Inc., 758 F. Supp. 1098, 1102, 1990 U.S.Dist. LEXIS® 12565 (D.S.C. 1990)(collecting cases); and Bellone v. Roxbury Homes, Inc., 748 F. Supp. 434, 436, 1990 U.S.Dist. LEXIS® 14401 (W.D.Va. 1990).

It is well-settled that a Notice of Removal must be filed by a ***defendant*** in the state court action within thirty days after the complaint in state court is served or within thirty days *after* the case becomes removable. *See* 28 U.S.C. § 1446; and Heniford v. American Motors Sales Corporation, 471 F. Supp. 328 (D.S.C. 1979), *appeal dismissed*, 622 F.2d 584 (4th Cir. 1980)[Table]. The original complaint in the above-captioned matter appears to have been filed in state court on August 18, 1999. The case was then removed by the ***plaintiff*** on November 23, 1999. Even assuming that a ***plaintiff*** is permitted to remove a case to federal court, the Notice of Removal was not timely filed. In any event, the removal statute requires that the ***defendant*** remove any state court proceeding, within the proper time period, under the proper circumstances, as noted above.

Although a federal court is not bound by the parties' characterization of a case or its appropriate parties, a district court must first look at the plaintiff's complaint filed in a state court to determine if "federal question" jurisdiction is present. Lyon v. Centimark Corporation, 805 F.Supp. 333, 334, 1992 U.S.Dist. LEXIS® 17312 (E.D.N.C. 1992). District courts are authorized to disregard such characterizations only to avoid "unjust manipulation or avoidance of its jurisdiction." Lyon v. Centimark Corporation, 805 F. Supp. at 334-335.

The complaint originally filed by the plaintiff in the Court of Common Pleas does not involve federal question jurisdiction. *See* Gully v. First National Bank in Meridian, 299 U.S. 109, 112-113 (1936). The complaint indicates that the state court action is for breach of contract, breach of fiduciary duty, and fraud, all state law causes of action. In addition, the

state court case could not have been filed in this federal district court because diversity of citizenship does not exist since the plaintiff and the defendants are all residents of the State of South Carolina, by the plaintiff's own admission in her state court complaint, which she filed with her notice of removal.

In short, the statutory language of 28 U.S.C. § 1441 permits removal only by defendants, not plaintiffs. The original suit filed by the plaintiff, a South Carolina resident, was based on state law causes of action against South Carolina defendants. Hence, the suit could not have been originally filed in the United States District Court for the District of South Carolina because federal question jurisdiction and diversity jurisdiction were lacking.

The law is unclear whether an order or a Report and Recommendation should be entered in this case, *See* Long v. Lockheed Missiles & Space Co., 783 F.Supp. 249 (D.S.C. 1972). Most case law subsequent to Long v. Lockheed Missiles & Space Co., has indicated that the undersigned may enter an order of remand. *See, e.g.,* Vaquillas Ranch Company v. Texaco Exploration & Production, Inc., 844 F.Supp 1156, 1160-1163, 1994 U.S.Dist.LEXIS® 6300 (S.D.Tex. 1994)(criticizing the rationale in Giangola v. Walt Disney World Co., 753 F.Supp. 143 (D.N.J. 1990), and distinguishing Long v. Lockheed Missiles & Space Co., supra); Holt v. Tonawanda Coke Corporation, 802 F. Supp. 866, 868, 1991 U.S.Dist.LEXIS® 10921 (W.D.Pa. 1990); and City of Jackson v. Lakeland Lounge of Jackson, Inc., 147 F.R.D. 122, 124, 1993 U.S.Dist.LEXIS® 4348 (S.D.Miss. 1993)("This Court joins that group of courts which hold that a motion to remand is nondispositive and can be determined by a magistrate judge by final order.").

The United States Court of Appeals for the First Circuit in Unauthorized Practice of Law Committee v. Gordon, 979 F.2d 11, 12-13, 1992 U.S.App. LEXIS® 29613 (1st Cir. 1992), noted the existence of conflicting authorities, including

Giancola v. Walt Disney World Co., supra, and Long v. Lockheed Missiles & Space Co., supra, but declined to resolve the issue:

> It is evident that the magistrate and the district court judge in the instant case treated the motion to remand as a nondispositive matter within the authority of the magistrate to determine by final order. While we note the existing and conflicting case law on this issue, we need not enter the fray a this time for we conclude that, in any event, we lack jurisdiction over this appeal. Unauthorized Practice of Law Committee v. Gordon, supra, 979 F.2d at 13.

In light of the greater weight of recent authorities holding that an order of remand can be entered by a magistrate judge, the undersigned is entering an order. Even so, this order can be appealed to a United States District Judge for review "under the clearly erroneous or contrary to law standard." Vaquillas Ranch Company v. Texaco Exploration & Production, Inc., supra, 131 F.R.D. at 467.

IT IS THEREFORE ORDERED that this case is remanded to the Court of Common Pleas. The Office of the Clerk of Court is directed to send a copy of this Order to **J. Brent Kiker, of Kiker & Dowds, P.A..**

If either party in the above-captioned case seeks to "appeal" this Order or file objections to this Order (if this Order is treated as a Report and Recommendation), the Office of the Clerk of Court shall forward this case file and any objections or appeal(s) to a United States District Judge. *See* Fed.R.Civ.P. 72(a). The aforementioned conflicting authorities indicate that a United States District Judge can review this order "under the clearly erroneous or contrary to law standard" or can treat this Order as a Report and Recommendation.

To avoid the problems that arose in City of Jackson v. Lakeland Lounge of Jackson, Inc., supra, 147 F.R.D. at 123-

124, **IT IS ORDERED that the Office of Clerk of Court shall not immediately certify this Order to the Court of Common Pleas.** If both parties in the above-captioned case fail to file an appeal of this Order or written objections to this Order (if this Order is treated as a Report and Recommendatin) within fourteen (14) days after this Order is filed, the Office of Clerk of Court shall then certify this Order to the Court of Common Pleas. If, however, either party files an appeal of this Order or written objections to this Order (if this Order is treated as a Report and Recommendation), the Office of the Clerk of Court, at the end of the fourteen-day period, shall forward the case file and any appeal or objections to a United States District Judge for a final disposition. The parties' attention is directed to the important notice on the next page.

s/Robert S. Carr
United States Magistrate Judge

Charleston, South Carolina
December 7, 1999

MASTER IN EQUITY
Thomas Kemmerlin, Jr.
P.O. Drawer 1228
Beaufort, South Carolina 29901
(843) 479-5295

January 12, 2000

Mr. E. Mitchell Griffith
P. O. Drawer 570
Beaufort, SC 29902

Mr. Brent Kiker
P. O. Box 2481
Beaufort, SC 29901

Re: Nancy D. Jonas vs. Svalina, Richardson & Larson , Alexander T. Virgil, Unisun Insurance Co.
99-CP-07-1292

Dear Mitch and Brent:

Draw me an order ruling in your favor, except at this time I do not grant sanctions, even though you may note that Ms. Jonas by representing herself does frequently file foolish and time consuming motions and if she persists sanctions may be forthcoming.

Send the original to me with copies to Ms. Jonas.

Yours truly,
s/Thomas Kemmerlin, Jr.

Tkjr:lh
Copy: Ms. Nancy D. Jonas

State of South Carolina)		In the Court of Common Pleas
)		
County of Beaufort)		Civil Action No.: 99-CP-07-1292
Nancy D. Jonas,)		
vs.)		
Svalina, Richardson & Larson,)		**AFFIDAVIT**
Alexander T. Virgil, and)		
Unisun Insurance Co.,)		
Defendants.)		

PERSONALLY APPEARED before me, Larry Shifflette, who, being duly sworn, deposes and states as follows:

1. I am employed as a Litigation Examiner by Defendant Unisun Insurance Company in the above-entitled action and work at their offices located at One Southpark Circle, Charleston, South Carolina.
2. I am the sole Examiner assigned to handle the above-captioned matter.
3. This action was commenced by Complaint filed in the Court of Common Pleas, State of South Carolina, County of Beaufort, on August 18, 1999.
4. After due diligence, I have found no proper service through the Department of Insurance of a Summons & Complaint in this matter.
5. This action arises from an automobile accident that occurred on August 20, 1996, and Plaintiff is seeking damages in an amount equal to double her insurance premium as a result.
6. The accident of issue occurred in Beaufort County, State of South Carolina.
7. Affiant has fully and fairly stated the facts of this case to his attorney, and after such statement has been

informed by such attorney, and verily believes, that Affiant has a good and substantial defense on the merits.
THE AFFIANT FURTHER SAYETH NAUGHT!

s/Larry Shifflette

Sworn to and Subscribed before me
this 17 day of January, 2000.
s/Abby J. Wilkins
NOTARY PUBLIC FOR SOUTH CAROLINA
My Commission Expires: September 21, 2008

Pro Se Closed

U.S. District Court
District of South Carolina (Beaufort)

Civil Docket for Case #99-CV-3869

Jonas, et al v. Unisun Insurance Co., et al. Filed: 11/23/99
Assigned to: Senior Judge Sol Blatt, Jr.
Demand: $0,000 Nature of Suit: 370
Lead Docket: None Jurisdiction: Federal Question
Dkt # in Charleston County : is 99-CP-07-1292

Cause: 28:1331 Fed. Question: Breach of Contract

NANCY D JONAS
plaintiff

Nancy D Jonas
[COR LD NTC] [PRO SE]
P O Box 1563
Beaufort, SC 29901

v.

UNISUN INSURANCE COMPANY
defendant

ORION AUTO INC
defendant

SVALINA RICHARDSON & LARSON
defendant

ALEXANDER T VIGIL
defendant

Docket as of January 21, 2000 3:43 pm Page 1 NON-PUBLIC

PRO SE CLOSED

INTERNAL USE ONLY: Proceedings include all events.
9:99cv3869 Jonas, et al v. Unisun Insurance Co, et al

Nancy D Jonas

plaintiff

v.

Unisun Insurance Company, Orion Auto Inc.; Svalina Richardson & Larson; Alexander T. Vigil

defendant

PRO SE CLOSED

INTERNAL USE ONLY: Proceedings include all events.
9:99cv3869 Jonas et al v. Unisun Insurance Co. et al

11/23/99 1 NOTICE OF REMOVAL with state court summons and complaint attached; FILING FEE $150.00 RECEIPT #200-9781 (MHIL) [Entry date 11/29/99]

12/1/99 – **Added PRO SE flag indicating Magistrate Judge involvement. (mhil) [Entry date 12/01/99]

12/3/99 2 MOTION by plaintiff Nancy D Jonas to stay proceedings in Court of Common Pleas, Beaufor, SC (jedw) [Entry date 12/03/99]

12/7/99 3 ORDER and REPORT AND RECOMMENDATIONS of Magistrate Judge Robert S. Carr. Case no longer referred to Magistrate Judge Robert S. Carr, ORDERED that this case be remanded to the Court of Common Pleas, Beaufort County (if this Order is treated as a Report and Recommendation) and the Clerk is directed to send a copy of this Order to j. Brent Kiker, of Kiker & Douds, PA. If either party seeks to appeal this Order, the Clerk shall forward this case file and any objections that may have been filed to a US district Judge who can review this order or can treat this order as a Report and Recommendation. FURTHER ORDERED that the Clerk shall not immediately certify this Order to the Court of Common Pleas. If both parties fail to file an appeal or this Order or written objections (if this Order is

treated as a Report and Recommendation) within 14 days, the Clerk shall then certify this Order to the Court of Common Pleas. If either paraty files an appeal or objections, at the end of the 14 day period, the Clerk shall forward the case file and any appeal or objections to a US District Judge for final disposition. Objections to R and R due by 12/27/99 (jedw) [Entry date 12/08/99]

1/12/00 – ORIGINAL FILE WITH R&R TO SUZANNE MOON (jedw) [Entry date 01/12/00]

1/13/00 – CASE REMANDED TO COURT OF COMMON PLEAS, BEAUFORT COUNTY (jedw) [Entry date 01/13/00]

1/13/00 – Case closed (jedw) [Entry date 01/13/00]

PRO SE CLOSED

INTERNAL USE ONLY: Proceedings include all events.
9:99cv3869 Jonas et al v. Unisun Insurance Co. et al

11/23/99 1 NOTICE OF REMOVAL with state court summons and complaint attached; FILING FEE $150.00 RECEIPT #200-9781 (MHIL) [Entry date 11/29/99]

12/3/99 2 MOTION by plaintiff Nancy D Jonas to stay proceedings in Court of Common Pleas, Beaufor, SC (jedw) [Entry date 12/03/99]

12/7/99 3 ORDER and REPORT AND RECOMMENDATIONS of Magistrate Judge Robert S. Carr. Case no longer referred to Magistrate Judge Robert S. Carr, ORDERED that this case be remanded to the Court of Common Pleas, Beaufort County (if this Order is treated as a Report and Recommendation) and the Clerk is directed to send a copy of this Order to j. Brent Kiker, of Kiker & Douds, PA. If either party seeks to appeal this Order, the Clerk shall forward this case file and any objections that may have been filed to a US district Judge who can review this order or can treat this order as a Report and Recommendation. FURTHER ORDERED that the Clerk shall not immediately certify this Order to the Court of Common Pleas. If both parties fail to file an appeal or this Order or written objections (if this Order is treated as a Report and Recommendation) within 14 days, the Clerk shall then certify this Order to the Court of Common Pleas. If either paraty files an appeal or objections, at the end of

the 14 day period, the Clerk shall forward the case file and any appeal or objections to a US District Judge for final disposition. Objections to R and R due by 12/27/99 (jedw) [Entry date 12/08/99]

1/13/00 – Case closed (jedw) [Entry date 01/13/00]

COMM JOURNALDATE JAN-21-2000* TIME 14:11**

MODE = MEMORY TRANSMISSION
START=JAN-21 14:10 END=JAN-21 14:11

STN NO.	COMM.	ABBR. NO.	STATION NAME/TEL.NO.
001	OK	*	918438389079

PAGES	DURATION
001/001	00:01:00

-CLERK, US DISTRICT CT9579-

********* - USDC -*****
****

Notice of Right to File Objections to Magstrate Judge's "Report and Recommendation"

The SERIOUS CONSEQUENCES of a Failure to Do So

The parties are hereby notified that any objections to the attached Report and Recommendation (or Order and Recommendation) must be filed within ten (10) days of the date of filing. 28 U.S.C. § 636 and FED. R. CIV. P. 72(b). The time calculation of this ten-day period excludes weekends and holidays and provides for an additional three days for filing by mail. FED. R. CIV. P. 6. Based thereon, this Report and Recommendation, any objections thereto, and the case file will be delivered to a United States District Judge fourteen (14) days after this Report and Recommendation is filed. Advance Coating Technology, Inc. v. LEP Chamber, Ltd., 142 F.R.D. 91-94 & n.3, 1992 U.S.Dist.LEXIS®6243 (S.D.N.Y. 1992). A magistrate judge makes only a recommendation, and the

authority to make a final determination in this case rests with the United States District Judge. *See* Matthews v. Weber, 423 U.S. 261, 270-271 (1976); and Estrada v. Witkowski, 816 F. Supp. 408, 410, 1993 U.S.Dist. LEXIS® 3411 (D.S.C. 1993).

During the ten-day period, but not thereafter, a party must file with the Clerk of Court specific, written objections to the Report and Recommendation, if he or she wishes the United States District Judge to consider any objections. **Any written objections must *specifically identify* the portions of the Report and Recommendation to which objections are made *and* the basis for such objections.** *See* Keeler v. Pea, 782 F. Supp. 41, 41-44, 1992 U.S.Dist. LEXIS® 8250 (D.S.C. 1992); and Oliverson v. West Valley City, 875 F. Supp. 1465, 1467, 1995 U.S.Dist. LEXIS® 776 (D. Utah 1995). Failure to file specific written objections shall constitute a waiver of a party's right to further judicial review, including appellate review, if the recommendation is accepted by the United States District Judge. *See* United States v. Schronce, 727 F.2d 91, 94 & n.4 (4th Cir.), *cert. denied*, Schronce v. United States, 467 U.S. 1208 (1984); and Wright v. Collins, 766 F.2d 841, 845-847 & n.1-3 (4th Cir. 1985). Moreover, if a party files specific objection to a portion of magistrate judge's Report and Recommendation, but does not file specific objections to other portions of the Report and Recommendation, that party waives appellate review of the portions of the magistrate judge's Report and Recommendation to which he or she did not object. In other words, a party's failure to object to one issue in magistrate judge's Report and Recommendation precludes that party from subsequently raising that issue on appeal, even if objections are filed on other issues. Howard v. Secretary of HHS, 932 F.2d 505, 508-509, 1991 U.S.App.LEXIS® 8487 (6th Cir. 1991). *See also* Praylow v. Martin, 761 F.2d 179, 180 n.1 (4th Cir.) (party precluded from raising on appeal factual issue to which it did not object in the district court), *cert. denied*, 474 U.S. 1009 (1985). In Howard,

supra. the Court stated that general nonspecific objection are *not* sufficient:

> A general objection to the entirety of the [magistrate judge's] report has the same effects as would a failure to object. The district court's attention is not focused on any specific issues for review, thereby making the initial reference to the [magistrate judge] useless. ***This duplication of time and effort wastes judicial resources rather than serving them and runs contrary to the purposes of the Magistrates Act. *** We would hardly countenance an appellant's brief simply objecting to the district court's determination without explaining the source of the error.

Accord Lockert v. Faulkner, 843 F.2d 1015, 1017-1019 (7th Cir. 1988), where the Court held that the appellant, who proceeded *pro se* in the district court, was barred from raising issues on appeal that he did not specifically raise in his objections to the district court:

> Just as a complaint stating only 'I complaint' states no claim, on objection stating only "I object' preserves no issue for review. *** A district judge should not have to guess what arguments an objecting party depends on when reviewing a [magistrate judge's] report.

See also Branch v. Martin, 886 F.2d 1043, 1046, 1989 U.S.App.LEXIS® 15,084 (8th Cir. 1989)("no de novo review if objections are untimely or general"), which involved a *pro se* litigant; and Goney v. Clark, 749 F.2d 5, 7 n.1 (3rd Cir. 1984) ("plaintiff's objections lacked the specificity to trigger *de novo* review"). **This notice, hereby, apprises the plaintiff of the consequences of a failure to file specific, written objections.** *See* Wright v. Collins, supra; and Small v. Secretary of HHS,

892 F.2d 15, 16, 1989 U.S.App.LEXIS® 19,302 (2nd Cir. 1989). Filing by mail pursuant to Fed. R. Civ. P. 5 may be accomplished by mailing objections addressed as follows:

Larry W. Propes, Clerk
United States District Court
Post Office Box 835
Charleston, South Carolina 29402

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

Nancy D. Jonas, Plaintiff, v. Unisun Insurance Co., Orion Capital/Auto, Svalina, Richardson & Larson and Alexander T. Vihil, Defendants.	**OBJECTIONS TO ORDER AND REPORT AND RECOMMENDATIONS OF MAGISTRATE JUDGE ROBERT S. CARR**

TO: JUDGES OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA, CHARLESTON DIVISION

PLEASE TAKE NOTICE that Objections to the Order and Report and Recommendations of Magistrate Judge, Robert S. Carr, are being filed on Monday, January 24, 2000, pertain to both the Order and the Report and Recommendation where 28 U.S.C. § 636 and the Federal Rules of Civil Procedure Rules 72 and Rule 6(a) and other statutory and decisional laws are relevant. The jurisdictional statutes involved are 28 U.S.C. § 1331, 1343 as related to 42 U.S.C. § 1985 and 28 U.S.C. § 1441, exceptional circumstances exception. The matter is "inherently judicial" so as to be properly before an Article III judge. The applicable standard of review is the clearly erroneous or contrary to law standard where review is not reached by way of "review" in the sense that the term is employed by 28 U.S.C. § 1447(d), Giangola v. Walt Disney World Co., 753 F. Supp 148, 153 (D.N.J. 1990).

AUTHORITY AND JUSTIFICATIONS FOR REVIEW

The procedural problems associated with service of this Order as well as its dispositive components are contrary to law and clearly erroneous. Allowing a magistrate such authority would raise a substantial constitutional question because of the improbability of meaningful district court review and the right to have a district court judge preside.

The procedural issues violative under provisions of federal rules, statutory and decisional authority and the U.S. Constitution are listed below:

1. The case was assigned to U.S. Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(A)(B). His duties must not be inconsistent with the Constitution and laws of the United States.
2. The Order and Report and Recommendations of Magistrate Judge Robert S. Carr was signed and filed December 7, 1999.
3. A copy of the Order and Report and Recommendations was mailed, postmarked January 13, 2000 by U.S. Mail, certified (Z 721 705 200), return receipt requested.
4. It was received on Saturday, January 15, 2000, along with a copy of the case file.
5. The Order stated, (p. 5, 6), "If both parties in the above-captioned case fail to file an appeal of this Order or written objections to this Order (if this Order is treated as a Report and Recommendation) within 14 days after this Order is filed, the office of the Clerk of Court shall then certify this Order to the Court of Common Pleas." "If, however, either party files an appeal of this Order or written objections to this Order (if this Order is treated as a Report and Recommendation), the office of the Clerk of Court, at the end of the fourteen-day period, shall forward the case file and any appeal or objections to a United States District Judge for a final disposition."

"The parties' attention is directed to the important notice on the next page."

This notice was omitted from the mailing, but was obtained from the Clerk's office. The document obtained was, "Notice of Right to File Objections to Magistrate Judges' Report and Recommendation. The Serious Consequences of a Failure to Do So."

6. The fourteen (14) day period referred to in the Order and Report and Recommendation is an apparent reference to the text of the attachment, just mentioned, where, quoting from that document, "Based thereon, this Report and Recommendation, any objections thereto, and the case file will be delivered to a United States District Judge fourteen (14) days after this Report and Recommendation is filed.

7. It further states, "a magistrate judge makes only a recommendation and the authority to make a final determination in this case rests with the United States District Judge. *See* Matthews v. Weber, 423 U.S. 261, 270-271 (1976); and Estrada v. Wilkowski, 816 F. Supp. 408, 410 (D.S.C. 1993).

8. Further, documents of Clerk of Court's office show there was a twenty (20) day period calculated in which to respond to the Order filed December 7, 1999, December 7, 1999 to December 27, 1999 as the period which was allowed for filing Objections.

9. Deputy Clerk, said the Order was mailed, not certified, after it was filed on the 7th of December, 1999. The Petitioner did not receive this copy.

10. The Order filed December 7, 1999 was received with Report and Recommendation and a copy of the case file on Saturday, January 15, 2000, postmarked January 13, 2000.

DISCUSSION AND PRESENTATION OF AUTHORITY

The "Notice of Right to File," omitted from the mailing states, "the plaintiff is hereby notified that any objections to the attached Report and Recommendation (or Order and Recommendation) must be filed within 10 days of the date of its filing." Proper notification and service is a fundamental due process right under the U.S. Constitution, 5th and 14th Amendments.

28 U.S.C. § 636(b)(1)(C) states, "within ten days after being served a copy, any party may serve and file written objections to such proposed findings and recommendations as provided by the rules of court." Both Rules 72(a) and 72(b) FRCP (1993 Supp.) governing nondispositive and dispositive matters, provide in pertinent part, "Within 10 days after being served, a party may serve and file specific written objections to the proposed findings and recommendations."

In summary, both Rule 72(a) and (b) FRCP (1993 Supp.), as well as 28 U.S.C. § 636 (b)(1)(C) provide that a party has ten days after being served with a copy of the Magistrate Judges' Report and Recommendation to make objections.

Vaquilla Ranch v. Texaco Exploration and Production, 844 F. Supp. 1156, 1159 (S.D. Texas 1994) was referenced in the Magistrate's Order. The Nalty case, 654 F. Supp. 1315 (S.D. Ala.) was cited, which held that "response periods to Magistrates' recommendations should be computed by first applying the less-than-eleven day provision of Rule 6(a) (FRCP) to the ten day time period prescribed by 72(a) and (b), thereby excluding any intervening Saturdays, Sundays, and legal holidays. The date of service shall be the date on which the Clerk of Court mails out the Magistrates' recommendation [citations omitted]. After establishing an initial response date by this method, three additional days should be added pursuant to Rule 6(c). If the final day should fall on a weekend or legal holiday, the objection should be due on the first official

business day thereafter." Nalty, 654 F. Supp. a 1317-18. This approach was adopted by the Ninth Circuit in Tushner v. U.S. District Court for the Central District of California, 829 F.2d 853 (9th Cir. 1987). Accord, National Savings Bank of Albany v. Jefferson Bank, 127 F.R.D. 218 (S.D. Fla. 1989); Cardente v. Fleet Bank of Maine, Inc., 146 F.R.D. 13, 21 (D.Me. 1993)." United States v. Certain Real Property in Waterboro, et al., 812 F. Supp. 259, 260 (D.Me. 1991); Andrew Corp. v. Gabriel Electronics, Inc., 735 F. Supp. 24, 26 n.1 (D.Me. 1990). "The Court notes that although the Nalty court made its ruling in terms of Rule 72(b), the same reasoning would now apply to Rule 72(a) on nondispositive motions since the wording of that Rule has been changed to match the wording of Rule 72(b) and § 636(b)(1)(C), requiring a response within ten days following service rather than ten days following entry of the Order. Advisory Committee notes 1983 addition subdivision (a) states "no specific procedures or timetables for raising Objections to the Magistrates' rulings on nondispositive matters are set forth in the Magistrates' Act. The rule fixes a 10-day period in order to avoid uncertainty and provide uniformity that will eliminate the confusion that might arise if different periods were prescribed by local rule in different districts." "Implementing the statutory requirements, the rule requires the district judge to whom the case is assigned to make a de novo determination of those portions of the report, findings or recommendations to which timely objection is made. The term "de novo" signifies that the Magistrates' findings are not protected by the clearly erroneous doctrine."

The docketing Record Sheet indicates that on January 13, 2000, the Order was certified to the state court pursuant to a telephone call, Chief Judge Sol Blatt, Jr. to Judge Kemmerlin, Jr. The case, City of Jackson, Miss. v. Lakeland Lounge of Jackson, Inc., 147 F.R.D. 122, 123 (S.D. Miss. 1993) references in that case, the Clerk of Court sent a certified copy of the Order of the Magistrate Judge to the Clerk of Court of the

state court pursuant to 28 U.S.C. § 1447(c). The telephone conversation on January 12, 2000 produced a letter (copy enclosed - dated January 12, 2000) stating in part, "Draw me an Order ruling in your favor . . . ." Judge Kemmerlin, Jr., to Brent Kiker and Mitch Griffith opposing attorneys which infers Dismissal rather than adjudication pursuant to Remand.

Within the Order and Report and Recommendation of December 7, 1999, the U.S. Magistrate Judge Robert S. Carr, writes, "It is Ordered that the office of the Clerk of Court shall not immediately certify this Order to the Court of Common Pleas." The Docket Record Sheet indicates on January 12, 2000, the original file with Report and Recommendation was sent to Suzanne Moon, Clerk to Chief Judge Sol Blatt, Jr.

The timely filing of Objections, here due on Monday, January 24, 2000 according to postmark January 13, 2000 ordinarily would prevent the Order of the Magistrate Judge from attaining the status of "final order."

The question becomes whether the act by the Clerk divested in the court of jurisdiction to review the Order and is answered that it is well established that once a district court certifies a remand order to the state court, it is divested of jurisdiction and can take no further action in the case, even if the court later determines that the remand was erroneous. The Court in City of Jackson, Miss. held that although certification in this case was premature, the set of certification by the Clerk, itself, however improperly divested the court of jurisdiction. Further, pursuant to 28 U.S.C. § 1447(d), a remand of a case to the sate court of origin is not "reviewable on appeal or otherwise."

Giangola v. Walt Disney World Co., 753 F. Supp. 148, 152, 153 (D.N.J. 1990) provides examination of the scope of authority granted to the magistrate by both the Congressional statute and local rules to find it was exceeded as to the substance of the matter adjudicated and the manner of disposition of the jurisdictional issue did not accord with the

procedure mandated by both the Statute and the Rules. First, the issue decided by the Magistrate was dispositive. "Perhaps no issue is so accurately described as dispositive as a determination which will destroy or uphold the Court's jurisdiction." While neither the Statute specifically removes an order of remand from the jurisdiction of a Magistrate, a remand order is the equivalent of a dismissal. There is conflict among the circuits as to whether a motion to remand is dispositive or nondispositive, a Motion to Remand is not listed in § 636(b)(1)A), though this motion for remand reached the merits and avoided constitutional review of them or process. Essentially, it was dispositive of the Motion for Remand and Motion to Dismiss Complaint by Mr. Kiker, dated October 18, 1999. The Magistrate's Order sought to effect an "involuntary dismissal" of the action. *See* 28 U.S.C. § 636(b)(1)(A). Judge Kemmerlin's letter indicates preordained dismissal. The "involuntary dismissal" as such, the Magistrate was not empowered to hear the matter without being designated by a District Judge. There was no hearing, no consent. The Magistrate though able to hold a hearing or make a determination and recommendation on the issue of whether removal was proper in this case was restricted to submitting proposed findings of fact and a recommendation for the disposition of the matter § 636(b)(1)(B). Thus, the Magistrate could not enter a valid order remanding the case to the Court of Common Pleas. The Order to Remand, given its additional procedural problems described earlier, was without legal effect and was null and void ab initio. Therefore, this case never the jurisdiction of this Court. The Magistrate was not empowered by statute or rule to render the final rulings. The final determination and the issuance of any enforceable Court order, must derive from an Article III judge, who remains ultimately responsible for the exercise and declination of a federal court's jurisdiction, Brock v. Heckler, 612 F. Supp. 1348, 1350 (D.C.S.C. 1985). The Supreme Court in its governance of

Article III Courts has found that Article III courts must be able to decide de novo all questions of law, constitutional facts and jurisdictional facts. St. Joseph Stockyards Co. v. U.S., 298 U.S. 38, 84 (1936) (Brandeis, J. concurring). This decision relates to legislative courts under Article I and fundamental fairness concerns. The Supreme Court has declared that "the supremacy of law" demands that there shall be an opportunity to have some court decide whether an erroneous rule of law was applied. Inherently, when judicial issues are present, they must be decided by an Article III judge. An Article III judge is required because of the text of the Constitution and separation of powers but is also based on due process considerations and where a substantial constitutional question is raised because of a conflict between the circuits. A substantial constitutional question is raised also because of the improbablity of meaningful district court review and the right to have an Article III judge preside. 28 U.S.C. § 2072 entitled the Rules Enabling Act, such rules shall not abridge, modify or enlarge any substantial right or direct results. "Essential attributes of judicial power are reserved to Article III courts," Justice O'Connor. That "requirements for the exercise of the judicial power must be met at all stages of adjudication," Justice Brennan, 458 U.S. 86 n. 39.

A district court judge, pursuant to 28 U.S.C. § 636(b)(1)(A) may refer to a magistrate judge for a hearing and determination any pending pretrial matter listed therein. The dispositive matters excepted are motions: for injunctive relief, to dismiss for failure to state a claim upon which relief can be granted, for summary judgment, for judgment on the pleadings and others. At this time, reference is made to Mr. Kiker's Motion to Remand and Motion to Dismiss Complaint dated October 18, 1999 which contain both dispositive components on which a Magistrate may not act. Both Remand and Dismissal were implicitly ruled on by Judge Carr's Order and effectuated by subsequent unlawful procedures.

By statute and under Article III, the District Court is required to review factual and legal conclusions of a magistrate judge, but is required to review de novo only those conclusions relevant to the case to which objections have been made. Legislative courts should be permitted only in narrow circumstances outlined in the plurality opinion, Northern Pipeline, 458 U.S.50 (1982).

28 U.S.C. § 1343 and 42 U.S.C. § 1985 preempt state court action where the case arises under federal question jurisdiction to the Article III courts and is governed by the U.S. Constitution, its federal laws and regulations.

ISSUES RAISED BY THE ORDER AND REPORT AND RECOMMENDATION AND OBJECTIONS TO THE ORDER AND REPORT AND RECOMMENDATION

The Order and Report and Recommendation raises the issue "a defendant in a case in a state court may remove that case to a federal district court only if the state action could have been originally filed in a federal district court."

Two questions are raised and response is that the "defendant-in-fact" removed the case. The case could have been originally filed in a federal district court based upon federal question jurisdiction 28 U.S.C. § 1331, et seq. and other federal law and constitutional provisions. The case was not well developed by extensive motion practice so as to be duplicative and wasteful of judicial resources. Removal was predicated on federal presumption doctrines. Congress created a federal cause of action under 28 U.S.C. § 1343 related to 42 U.S.C. § 1985 (3) and Article I, the Sherman Act (1890), 18 U.S.C. § 1961, et seq., and others.

Metropolitan Life Insurance Co. v. Taylor, 481 U.S. 53, 63, 64 (1986) recognized that an exception to the well pleaded complaint rule is found where Congress has so completely preempted a particular area that "any civil complaint raising this

select group of claims is necessarily federal in character." Decisions interpreting § 1331 have formulated a principle that "a case arises under federal law if it is apparent from the face of the Plaintiff's Complaint either that the Plaintiff's cause of action is created by federal; or, if the plaintiff's cause of action is based on state law, a federal law that creates a cause of action is an essential component of the Plaintiff's claim." "The desirability of having federal courts hear and decide federal questions is 'independent of which party introduces the federal question . . . [or] where in the structure of the case the issue is technically located," Doernberg, 38 Hastings L. J. 597 (1987). The must be an evaluation of the nature of the federal interest at stake.

The seminal case was originally filed interpreting federal question jurisdiction under Article III is Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738 (1824). Chief Justice Marshall explained that under the Constitution a case arises under federal law whenever federal law forms an ingredient of the original cause . . . even though other questions of fact or law may be involved in it at 823. In 1875, Congress authorized the general federal question jurisdiction statute § 1331 which has remained unchanged except for the 1980 deletion of amount in controversy. Federal question jurisdiction is the ability to hear suits arising under the Constitution, laws and treaties of the United States. The subject matter jurisdiction of federal courts requires both statutory and constitutional authority Crowell v. Benson, 285 U.S. 22 (1932). Article III defines the matters that federal courts may hear but it is silent as to the procedures that may be used to initiate federal court jurisdiction. § 1331 jurisdiction will support claims founded upon federal common law.

A case may be originally filed in a federal district court if there is diversity of citizenship under 28 U.S.C. § 1332. It is well settled that complete diversity is not a constitutional requirement. The complete diversity rule enunciated by Chief

Justice Marshall is 1806 is entirely a product of statutory interpretation and thus it could be abolished by Congress. The exception for complete diversity is the Federal Interpleader Statute 28 U.S.C. § 1335 which allows a federal court to decide all claims to a single sum put within its jurisdiction so long as there is minimal diversity (at least 1 plaintiff from a different state than 1 defendant). *See* State Farm Fire and Casualty Co. v. Tashire, 386 U.S. 523 (1967). The constitution does not mention an amount in controversy. The legal certainty doctrine states that the will be dismissed only if there is legal certainty that the plaintiff can not recover $75,000.

Removal proceedings are in the nature of process. The Supreme Court has long treated the technical requirements of the federal removal statutes as procedural not jurisdictional Mackay v. Unita Development Co., 229 U.S. 173 (1913). The Court was asked to answer a certified question about whether the federal court had jurisdiction to decide a removal case when the removal was "not in conformity with the removal statute." MacKay has never been overruled.

Removal jurisdiction is not expressly mentioned in Article III though statutes have authorized removal ever since the Judiciary Act of 1789. The order raises the question that Notice of Removal was not timely filed according to "Notice of Removal must be filed by a defendant in the state court action within thirty days after the Complaint in state court is served or within thirty days *after* the case becomes removable." Various federal courts have held that removal statutes are to construed against removal jurisdiction, and in favor of remand. Magistrate's Order, p. 2. The assumption to remand is that it will be litigated in state court and is suitable to that jurisdiction. Remand is not meant to serve as a vehicle to foreclose jurisdiction of all courts. The Kemmerlin letter would affirm preordained dismissal.

A "showing of cause" exception to justify extension of the 30 day period is discussed in Martropico Compania Naviera

SA, 458 F. Supp. 1038. Another exception provides there must be a demonstration of some unusual set of circumstances, Gray v. Permanent Mission of the People's Republic of the Congo to the United Nations, 443 F. Supp. 816, 821 (S.D.N.Y.), aff'd mem., 580 F.2d 1044 (2d Cir. 1978).

The original complaint was filed in the state court on August 18, 1999. The case was removed by the "Defendant-in-fact" (Complainant/Plaintiff) on September 30, 1999. The removal process under instruction of the Clerk's Office was perfected on November 23, 1999. Petition was advised of "new policy" governing pro se petition where the judges mandated review in Columbia before officially filing. Notice was to have been provided of official acceptance after review was complete. While awaiting notice no discovery was undertaken. No notice was ever transmitted officiating status where adjustments requested September 30, 1999 were minor.

A federal court is not bound by the parties characterization of a case or its appropriate parties. Accord.

The complaint as originally filed implicates federal jurisdiction, previously discussed where the federal preemption doctrine applies. The fact that this Complaint raises presumable issues under the Sherman Act (1890) and the Commerce Clause infers an interstate nature. A right created by the Constitution or laws of the United States must be an essential element. A genuine and present controversy must exist and an injury evident in fact.

The U.S. District court in Charleston in conference with the U.S. District Court in Columbia, South Carolina affirmed jurisdiction and supported sufficiency of removal evidenced by referral to the Magistrate for pretrial determination of non-dispositive matters and subsequent recommendation to the Article III judge. That the Magistrate acted in a manner clearly contrary to the mandates of the Congressional enactment which assigns his jurisdiction and powers (28 U.S.C. § 636(b)(1)(A) inclusive of restraints, he acted in a manner contrary to law and

forbidden by the U.S. Constitution, Article III, Article VI, the 5th and 14th Amendments. He exceeded his authority in this matter as an Article I judge imposing foreclosure forbidden by the Constitution and its laws.

BASED UPON THE FOREGOING, the decision was not properly affirmed under Article III by one of its judges who remains ultimately responsible for the exercise or declination of a federal court's jurisdiction.

The Petitioner prays that the Court will determine that these objections are not relevant (except as may be applicable to the case) where there is no legally valid determination, Giangola v. Walt Disney World Co., 753 F. Supp. 148 (D.N.J.); Vaquillas Ranch v. Texaco Exploration and Production, 844 F. Supp. 1156, 1158 (S.D. Texas 1994) and that jurisdiction never left this Court but is retained by the Article III judge.

Respectfully submitted,
s/Nancy D. Jonas
Charles Street
Post Office Box 1563
Beaufort, SC 29901

January 24, 2000
Beaufort, South Carolina

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA

Nancy D. Jonas, Plaintiff,	)	C/A No. 9:99-3869-08AJ
vs.	)	ORDER
Unisun Insurance Co.; Svalina, Richardson & Larson; and Alexander T. Vihil, Defendants.	)	Filed February 4, 1999

This matter is before the Court by the pro se Plaintiff's January 26, 2000, objections to the Order and Report and Recommendation filed by United States Magistrate Judge Robert S. Carr, on December 7, 1999, wherein he ordered that the action be remanded to state court unless any party appealed to the district court within fourteen days. Because no objections were received, the Clerk of Court adhered to the order to remand, and the action was remanded on January 13, 2000. The Plaintiff asserts that she did not receive a copy of the December 7, 1999, Order and Recommendation until January 15, 2000.

Because this action has been remanded to the state court, this Court has no jurisdiction over the case and no authority to reconsider the December 7, 1999, order to remand. In Re Lowe, 102 F.3d 731 (4th Cir. 1996). Moreover, even if this Court considered the Plaintiff's objections, it would affirm the Report and Recommendation on the merits and adopt it as this Court's Order.

Accordingly, it is

ORDERED that the Plaintiff's January 26, 2000, objections are overruled; the Clerk of Court shall file this Order in this federal civil action and mail a copy to all parties and to the Clerk of the South Carolina State Court where the case was remanded.

IT IS SO ORDERED.

s/Sol Blatt, Jr.
Senior U.S. District Judge

February 3, 2000
Charleston, S.C.

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February 11, 2000

The Honorable Thomas Kemmerlin, Jr.
Master-in-Equity, Beaufort County
Post Office Box 1228
Beaufort, SC 29901-1228

Re: Nancy D. Jonas vs. Svalina, Richardson, and Larson, Alexander T. Virgil, and Unisun Insurance Co.,
Civil Action No. 99-CP-07-1292
G&S File : 4063

Dear Judge Kemmerlin:

Please find enclosed an Affidavit of Non-Service from the adjuster regarding the above captioned matter. This is forwarded pursuant to your request during a Motion to Dismiss for lack of service which was heard by you some time ago.

I would appreciate it if you would take this into consideration and grant my Motion to Dismiss.

If you have any questions regarding this matter, please do not hesitate to contact me.

With kind regards, I remain

Yours very truly,
Harvey W. McCormick, III

HWM/kkm
Enclosures

KIKER & DOUDS, P.A.
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J. Brent Kiker
Anne S. Douds*
*Admitted to SC & GA Bar

February 21, 2000

Honorable Thomas Kemmerlin, Jr.
Special Circuit Court Judge
Post Office Drawer 1228
Beaufort, South Carolina 29901

Re: Nancy D. Jonas v. Svalina, Richardson & Larson, et al.
99-CP-07-1292

Dear Judge Kemmerlin:

Enclosed is the original order drafted at your request. By copy of this letter, I am sending a copy of the enclosed order to the plaintiff and to Mitch Griffith, counsel for the co-defendant Unisun Insurance Co.

If you have any questions, please contact my office.

With kind regards, I am

Sincerely,

KIKER & DOUDS, P.A.

s/J. Brent Kiker

JBK:fam

cc: Nancy D. Jonas
Samuel Svalina, Esq.
Alexander Vihil (through his attorney)
E. Mitch Griffith, Esq.
Daniel A. Larson

State of South Carolina	)	In the Court of Common Pleas
	)	
County of Beaufort	)	Civil Action No.: 99-CP-07-1292
Nancy D. Jonas,	)	
vs.	)	
Svalina, Richardson &	)	ORDER
Larson, Alexander	)	
Virgil, and Unisun	)	
Insurance Co.,	)	
Defendants.	)	

This matter came before me on Defendants Svalina, Richardson & Larson ("Svalina") and Alexander Virgil's ("Virgil") Motion to Dismiss and Motion for Sanctions. These defendants seek dismissal of the plaintiff's *pro se* complaint on the grounds that it states no claim against them. A hearing was held and, after hearing arguments and considering the pleadings, I conclude that the Defendants' motion should be granted in part and denied in part.

The plaintiff is known to the court to file and prosecute time consuming and frivolous actions. Notwithstanding that, the Court diligently read her complaint with an eye towards sustaining the complaint if any cause of action was presented andproperly plead therein. I cannot, however, determine any cause of action against these defendants that warrants relief to the plaintiff, even taking her allegations as true.

Essentially, the plaintiff asks this court for damages allegedly suffered because of these defendants' contributions in raising her insurance rates. Specifically, the plaintiff states that on August 20, 1996, she rear-ended a motorcyclist, the Defendant, Alexander Virgil. Virgil was, according to the Plaintiff, not seriously injured. The Defendant Svalina represented Virgil ina claim against the plaintiff. The plaintiff's insurance carrier, Unisun Insurance Co. ("Unisun"), negotiated

the settlement. According to the plaintiff, Virgil's claim was settled for $5,750.00 without her knowledge. Since the accident, her insurance rates have gone up as a result. For this, she seeks compensation.

While her complaint characterizes the defendants' conduct as "fraudulent", the elements of fraud, which must be plead with particularity, are not contained in the complaint. Additionally, her claims of negligence and breach of fiduciary duty are directed towards Unisun alone, not Svalina and Virgil; accordingly, no cause of action has been stated against the moving defendants.[1]

The plaintiff's complaint does not state a cause of action for which relief may be granted and I therefore dismiss the action against the moving defendants. However, I deny the defendants' motion for sanction. If an attorneyh had prepared the pleadings in this case, I would award the defendants any attorney fees expended to date; however, given the *pro se* status of the plaintiff, I will not today hold her to the same standard as a member of the bar. I will, however, consider this Order as notice to the plaintiff of the requirements of Rule 11 of the South Carolina Rules of Civil Procedure and caution her with respect to future filings with this Court.

For the foregoing reasons, the defendants' motion to dismiss is **GRANTED** and the defendants' motion for sanctions is **DENIED.**

---

[1]Of course, no cause of action for negligence or breach of fiduciary duty may be stated against the moving defendants because there is on legal duty, in tort or in otherwise, owed to negligent party in a car wreck by the victim or his attorney. These defendants simply settled a negligence action with the plaintiff through her insurer. That issue is not before me and I decline to comment on the merits of plaintiff's claims against Unisun.

s/Thomas Kemmerlin, Jr.
Special Circuit Court Judge
Fourteenth Judicial Circuit

February 25, 2000

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA

Nancy D. Jonas, Plaintiff, -vs- Unisun Insurance Co.; Richardson, and Larson; and Alexander T. Vihil, Defendants.	)	C/A No. 9:99-3869-8AJ **ORDER** FILED MAR 9 2000

On January 13, 2000, this action was remanded to the Beaufort Court Court of Common Pleas. On January 26, 2000, the pro se Plaintiff filed an objection to the Order to remand, which this Court denied on February 4, 2000. On February 14, 2000, the Plaintiff filed a Notice of Appeal in federal court. For purposes of the appeal, this Court requests that the Clerk of Beaufort County Court of Common Pleas return the file to: United States District Court, Clerk of Court, Attention: Jane Wolper, P.O. Box 835, Charleston, SC 29402, so that it may be sent to the Clerk of the Fourth Circuit Court of Appeals.[1] Accordingly, it is

ORDERED that the Clerk of Court serve a copy of this Order on the Clerk of Beaufort County Court of Common Pleas.

IT IS SO ORDERED.

s/Sol Blatt, Jr.
Senior U.S. District Judge

March 9, 2000
Charleston, South Carolina

[1]The Clerk of the Fourth Circuit Court of Appeals has requested the file.

SUMMARY OF RELIEF REQUESTED

Pursuant to FRAP 27 and Local Rule 27(f), Defendant-Appellee Svalina Richardson & Larson hereby moves the Court to dismiss this appeal on the ground that the appeal is not within the jurisdiction of this Court because: (1) the Plaintiff-Appellant improperly removed to federal court the case she filed in state court; and (2) neither federal question nor diversity jurisdiction exists in this case.

SUMMARY OF THE CASE

The facts relevant to this motion are not in dispute. On August 20, 1996, Plaintiff-Appellant Nancy D. Jonas ("Jonas") rear-ended a motorcyclist, Defendant-Appellee Alexander Vihil ("Vihil"). Defendant-Appellee Svalina Richardson & Larson ("the Svalina Law Firm") represented Vihil in a claim against Jonas. Jonas' insurance carrier, Defendant-Appellee Unisun represented Vihil in a claim against Jonas. Jonas' insurance carrier, Defendant-Appellee Unisun Insurance Compan ("Unisun"), settled Vihil's claim for $5,750.00. Jonas then filed a pro se complaint (Exhibit 1) in South Carolina state court against Vihil, the Svalina Law Firfm, and Unisun in which she asserted various state common law causes of action, all of which were based on her allegation that the Defendants caused her automobile insurance rates to increase.

On September 13, 1999, the Svalina Law Firm filed a motionto dismiss the complaint and a motion for sanctions against Jonas for filing a frivolous lawsuit (Exhibit 2). Thereafter, on September 28, 1999, Jonas filed a "Notice of Removal and Petition for Original Jurisdiction of the District Court" in the United States District Court for the District of South Carolina, Charleston Division (Exhibit 3). In other words, Jonas filed a pro se complaint in the South Carolina state court, and then proceeded to remove her complaint to federal district court.

On December 7, 1999, United States Magistrate Judge Robert S. Carr issued an Order and Report and Recommendation (Exhibit 4) in which he held that: (1) Jonas, as the plaintiff, improperly removed to federal court the complaint she filed in state court; (2) Jonas' notice of removal was not timely filed; and (3) the federal district courts lack diversity or federal question jurisdiction over her claims.

On February 14, 2000, Jonas filed a notice of appeal of Judge Carr's Order remanding her case to state court. Thereafter, on February 25, 2000, the South Carolina state court judge issued an order which dismissed the state action and cautioned Jonas against future frivolous filings (Exhibit 5 at p.2).[1]

DISCUSSION

This Court lacks jurisdiction over this appeal. Subject to certain exceptions not applicable here, the federal district courts have jurisdiction only over cases in which there is complete diversity of citizenship between all plaintiffs and all defendants under 28 U.S.C. § 1332 (diversity jurisdiction) or which involve substantial issues of federal law under 28 U.S.C. § 1331 (federal question jurisdiction). Diversity jurisdiction does not exist under 28 U.S.C. § 1332 because Jonas, the Svalina Law Firm, and Vihil are all citizens and residents of the State of South Carolina. (Exhibit 6)[2]

Moreover, this action was not properly before the United States District Court because, as the plaintiff, Jonas could not remove to federal court the complaint she filed in state court.

---

[1]In his Order, the state court judge notes that, "The Plaintiff is known to the court to file and prosecute time consuming and frivolous actions" (Exhibit 5 at p.1)

[2]Exhibit 6 is a "complaint" which Jonas included with her notice of removal.

See 28 U.S.C. § 1446(a) (stating the procedure under which a defendant may remove a case from state court to federal court). Even if Jonas was permitted to remove her case to federal court, her notice of removal was not timely filed because she filed the state court action on August 18, 1999 (Exhibit 1), but her notice of removal was filed more than thirty days later on September 28, 1999 (Exhibit 1). 28 U.S.C. § 1446(b) (stating the notice of removal "shall be filed within thirty days" after receipt of the initial pleading). All of these issues are discussed in detail in Judge Carr's Order remanding this case to state court (Exhibit 5).

CONCLUSION

The Plaintiff-Appellant improperly removed her complaint from state to federal court, and the federal courts lack diversity or federal question jurisdiction over her claims and this appeal. Therefore, the Svalina Law Firm requests that this Court dispense with the need for filing of briefs and dismiss this appeal to avoid further undue burden on the parties and the Court in addressing this issue.

NOTIFICATION AND CONSENT

Pursuant to FRAP Local Rule 27(a), the undersigned counsel certifies that he notified counsel for the other Defendants-Appellees prior to filing this Motion and was informed that they consent to the relief sought in this Motion. The undersigned counsel further certifies that he did not consult with the pro se Plaintiff-Appellant prior to filing this motion because he is informed and believes that such consultation would serve no useful purpose.

Respectfully submitted,
s/David J. Parrish, Fed. Id. 6361
Susan W. Taylor, Fed Id. 4502
NEXSEN PRUET JACOBS
POLLARD & ROBINSON, LLP

200 Meeting St./PO Box 486
Charleston, SC 29402
(843) 577-9440
ATTORNEYS FOR
DEFENDANT-APPELLEE
SVALINA RICARDSON &
LARSON

March 28, 2000

APPELLANT'S RESPONSE IN OPPOSITION

Before the Court of Appeals for the Fourth Circuit is not an Appellee Brief addressing the issues raised on appeal from the Order of Judge Sol Blatt, Jr., entered on February 4, 2000, but rather a Motion to Dismiss. The firm Nexsen, Pruet, Jacobs, Pollard & Robinson, LLP (hereinafter "Nexsen Pruet"), now representing appellees Svalina, Richardson & Larson (hereinafter "Svalina Law Firm") propose that they and the Svalina Law Firm be allow to dispense with the need for filing briefs. They request that the Court dismiss the appeal to avoid further undue burden on themselves and the appellee Svalina Law Firm in addressing the issues. The proposed Motion to Dismiss additionally serves the interests of the Court below where in certain proceedings judges are represented by counsel for defendants. Essentially, the Motion would emasculate the case and afford protection under preclusive doctrines.

This strategy is buy another aspect of ongoing collusive conduct to defeat any consideration of the serious misconduct which implicates the judiciary.

Svalina Law Firm and Nexsen Pruet together claim (Motion to Dismiss "Discussion") "This Court lacks jurisdiction over this appeal." This assertion demonstrates a failure to recognize that this Court not only has jurisdiction, but a mandate where there is compelling rationale for assuming jurisdiction given jurisdictional errorand aggravated abuse of discretion and where impact on the court system seems particularly serious. Where a court exceeds its jurisdiction of the appellate courts and the whole judicial structure. The Svalina Law Firm, along with Nexsen Pruet, attempts to deprive the appellate court of its authority and a principle function –to police its subordinate courts. The Motion to Dismiss does not reflect in any way that the subordinate courts are egregious offenders of the United States Constitution under Article III and Article VI and flagrant violators of the Fifth and Fourteenth

Amendments. There are substantial constitutional and statutory grounds for the exercise of this court's jurisdiction.

Justification may be found upon review of the procedural history where there is a well coordinated conspiracy to defeat this cause of action and violate the rights of the Appellant to near shock the conscious levels. The Svalina Law Firm and its attorneys persist with Motions to Dismiss which they have filed at every court level to obstruct justice and possible review of their conduct and the evolving issues.

The Order of U.S. Magistrate Judge Carr, filed December 7, 1999, essentially granted the Motion to Remand and/or Motion to Dismiss, filed October 18, 1999, which included assessment of costs. The Court erred jurisdictionally by making an order of a kind which it lacks power to issue The Order failed in many critical aspects, including a finding that remand is non-dispositive (a clear abuse of discretion), demonstrating a failure to recognize the controlling authority enunciated by Chief Judge Hawkins in Long v. Lockheed Missiles and Space Co., Inc., 783 F.Supp 249 (D.S.C. 1992) (4th Cir., Chas. Div.) which was cited along with Giangola v. Walt Disney World Company, 753 F.Supp 148 (D.N.J. 1990) (3rd Cir.), in Vaquillas Ranch, Ltd.v. Texaco Exploration and Production, 844 F.Supp. 1156 (S.D. Texas 1994) (5th Cir.). Further the U.S. Magistrate did not provide service of this Order upon the Appellant an effecuated remand January 13, 2000, when remand was mailed to state court. The Appellant was served a copy of the Order in connection with remand along with the case file on January 15, 2000. Objections were subsequently filed under the authority of 28 U.S.C. § 636(b)(1)(C), FRCP, Rule 72 and case authority. On February 4, 2000, the district court Judge Sol Blatt, Jr., refused consideration for want of jurisdiction due to remand and refused review of the Objections based on the same grounds. The district court affirmed the Order of the Magistrate in totally adopting it as his own if he had jurisdiction.

The district court abdicated inherent judicial authority under Article III and Article IV. It condoned state court defiance of the federal statute § 1444(d) and ignored a pending emergency Motion to Enjoin state court proceedings and sanctions prusuant to 28 U.S.C. § 1927, filed December 3, 1999, collaborating with the state court on the remand which erected the bar of § 1447(d). Upon remand, the bar for review under § 1447(d) further prohibited review.

The Motion to Dismiss pending here and the Order of the state court drafted by Svalina Law Firm attorney, J. Brent Kiker, entered on February 24, 2000, are both crafted to manipulate and use suggestive phrasing. Examples include:

1. "rear-ended" is adopted from the state court order for use in the Motion to Dismiss here, the officer used the phrase "tapped-into."
2. The Order granting Defendant's Motion to Dismiss entered on February 25, 2000 included the sentence "Virgil was, according tothe Plaintiff, not seriously injured." No remark of this nature was ever made as no injury ever existed in reality and was not remotely probable.
3. The Motion to Dismiss (Nexsen Pruet) states appeal was taken from the Order fo the U.S. Magistrate Judge Carr entered on December 7, 1999, when, in fact, this appeal was taken from the Order for the district court Judge Sol Blatt, Jr., entered on February 4, 2000.
4. The Motion and Order both represent that all claims were based on her allegations that the defendants caused her insurance rates to increase.
5. The Motion to Dismiss, footnote 1. In his Order, the state court judge notes that, "The Plaintiff is known to the court to file and prosecute time-consuming motions and frivolous actions," depicts an unjustified bias which Nexsen Pruet wishes to convey here. The court would be astounded by the magnitude of this problem.

6. The Motion to Dismiss and Motion for Sanctions of Defendants Svalina Law Firm and Alexander T. Vihil filed September 23, 1999, in state court was recently granted when the state court Order drafted by attorney for these Defendants was filed February 25, 2000. At subsection 3, the Motion included an allegation that these Defendants and their attorney sought sanctions against the Plaintiff "for abusing the judicial process and filing frivolous pleadings solely to harass and embarrass the parties, and for filing pleadings that serve no other purpose than to waste the court's resources and time when the Plaintiff knew her claims against these defendats were groundless."

The Order drafted by the same attorney and granted by the Judge further includes the sentence, "Vihil was, according to Plaintiff, not seriously injured," a reference to personal injury. The footnote 1 of the Order on page 2 continues. "These defendants simply settled a negligence action with the plaintiff through her insurer." Defendant's Motion and Order incorporating that motion abuse the judicial process. They falsely portray and create impression of truth which the court Order validates.

7. The Motion to Dismiss (Nexsen Pruet). "Moreover, this action was not properly before the United States District Court because as the Plaintiff, Jonas could not remove to federal court the Complaint filed in state court. See 28 U.S.C. § 1446(a) stating the procedure under which a defendant may remove a case from state court to federal court.

The artful pleading doctrine is employed by courts to determine parties and interests as well as attempts to conceal the federal nature of claims by fraud or obfuscation. The Appellant established defendant status in state court when she chose to appear in

Magistrate Court, Beaufort County, in connection with the traffic ticket. (See record for copy of ticket driving record of Alexander T. Vihil). That the appellant was a complainant in circuit court was determined by the cover activity of the Svalina Law Firm and Unisun Insurance Company.

8. The Motion to Dismiss appends the Defendant's Motion to Dismiss and Motions for Sanctions drafted by J. Brent Kiker on September 13, 1999, which was directed to the state court. Not included was his only motion before the federal court, a Motion to Remand and Motion to Dismiss Complaint, dated October 18, 1999. The U.S. Magistrate granted this Motion in his December 7, 1999 Order, exceeding his statutory authority as an Article I judge.

CONCLUSION

The case involves substantial issues of federal law under 28 U.S.C. § 1331 (federal question jurisdiction) is discussed in the Appellant's Brief.

The Motion of Defendant-Appellee Svalina Law Firm to Dismiss Appeal is not an appropriate response to the issues presented on appeal. As such, it should be denied.

Respectfully submitted,
s/Nancy D. Jonas
Charles Street
P.O. Box 1563
Beaufort, SC 29901

Beaufort, South Carolina
April 8, 2000

PLAINTIFF-APPELLANT,
PRO SE

MASTER IN EQUITY
Thomas Kemmerlin, Jr.
P.O. Drawer 1228
Beaufort, South Carolina 29901
(843) 479-5295

MOTION ROSTER FOR BEAUFORT COUNTY

April 17, 2000

Please Circulate to Every Lawyer in Your Firm

RE: Master's Motion Roster for Jury and Non-Jury Cases Wednesday, May 3, 2000, Thursday, May 4, 2000 and Friday May 5, 2000.

I am sufficiently caught up on my work to hear jury and non jury motions except taht I will not hearing summary judgment motions injury cases at this time.

When an attorney is instructed to prepare an order he shall not present i to me for signature unless opposing counsel has signed his name under the word "SEEN", which signature shall mean only that the order complies with my oral ruling. An attorney who is instructed to draw an order shall prepare and send it to opposing counsel within ten (10) days and opposing counsel shall mark it seen, sign and return it, or write the preparing attorney a letter setting forth the reasons he cannot so sign, all within five (5) working days after he receives it. If the attorneys cannot agree upon the wording, one of them shall move to have me reduce the ruling to writing.

If the same case appears on the roster more than once, all motions on it will be heard at the time it first appears on the roster.

You are to notify all pro-se persons and you are to notify all attorneys whose names do not appear if their attendance is necessary.

I will have no Court Reporter present. If you want a Court Reporter, you have to bring one.

I will hear no motions by phone.

If the moving party does not appear to argue a motion, the motion will be deemed abandoned as moot unless it was earlier continued. After appearing on the motion roster three times, if the motion be not then heard, the motion will be dismissed and will have to be re-filed and served.

Yours truly,
s/Thomas Kemmerlin, Jr.

May 3, 2000
2:00 p.m.

46. Nancy D. Jonas
Pro Se
v.
Svalina, Richardson & Larson
Brent Kiker
(For Sanctions)

GRIFFITH & SADLER, P.A.
ATTORNEYS AT LAW
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Writer's e-mail: hwm@gandspa.com

June 21, 2000

The Honorable Patricia S. Connor
Clerk of Court
U.S. Court of Appeals for the 4th Circuit
1100 East Main Street, Suite 501
Richmond, VA 23219

Re: Nancy D. Jonas vs. Svalina, Richardson and Larson
Alexander T. Virgil, and Unisun Insurance Co.
Civil Action No. 99-CP-07-1292
G&S File: 4063

Dear Ms. Conner:

Please be advised that I have been retained to represent Unisun Insurance Company in regard to the above captioned matter. While we are receiving copies of these motions, Unisun Insurance Company has not bee properly served as a Defendant and there was a Motion to Dismiss filed. Please forward me any documentation so that I may note my representation as counsel for this party.

With kindest regards, I remain

Yours very truly,

s/E. Mitchell Griffith

EMG/kkm

cc: Nancy D. Jonas
J. Brent Kiker, Esquire

United States Court of Appeals
for the Fourth Circuit
Lewis F. Powell, Jr. United States Courthouse Annex
1100 East Main Street, Suite 501
Richmond, Virgina 23219-3517

Patricia S. Connor
Clerk

Telephone
(804) 916-2700

June 26, 2000

Ernest Mitchell Griffith, Esq.
DAVIS, TUPPER, GRIMSLEY & SEELHOFF
155 Sea Turtle Parkway
P. O. Box 2055
Beaufort, SC 29901

Re: 00-1217 Jonas v Unisun Insurance
CA-99-3869-9-8AJ

Dear Counsel:

In response to your letter of 6/12/00, enclosed is a counsel of record form for you to sign and return within 10 days of the date of this letter.

Yours truly,
Patricia S. Connor
Clerk

/s/ Jean St. John
Deputy Clerk

Enclosure(s)
cc: Nancy D. Jonas
David Jay Parrish
Jonathan Brent Kiker

UNPUBLISHED
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Nancy D. Jonas,	)	
Plaintiff-Appellant,	)	
v.	)	
Unisun Insurance Company;	)	No. 00-1217
Orion Auto Incorporated;	)	
Svalina, Richardson & Larson;	)	
Alexander T. Vihil,	)	
Defendants-Appellees.	)	
	)	

Appeal from the United States District Court
for the District of South Carolina, at Charleston
Solomon Blatt, Jr., Senior District Judge.
(CA-00-3869-9-8AJ)
Submitted: May 10, 2000
Decided: September 20, 2000
Before NIEMEYER, MICHAEL, and TRAXLER, Circuit Judges.
Dismissed by unpublished per curiam opinion.

COUNSEL

Nancy D. Jonas, Appellant Pro Se. Ernest Mitchell Griffith, GRIFFITH & SADLER, Beaufort, South Carolina; David Jay Parrish, NEXSEN, PRUET, JACOBS, POLLARD & ROBINSON, Charleston, South Carolina; Jonathan Brent Kiker, KIKER & DOUDS, P.A.,Beaufort, South Carolina, for Appellees.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

OPINION

PER CURIAM:

Nancy D. Jonas appeals the magistrate judge's order remanding a civil case that Jonas, as the plaintiff, improperly removed from a South Carolina state court. Jonas also appeals the district court's order overruling her subsequent objections to the magistrate judge's order. Finding no reversible error, we affirm.

Although this court has not addressed whether a magistrate judge may issue an order of remand (as opposed to issuing a report and recommendation for the district court's review), we grant the Defendant's motion to dismiss as we find that the order is not reviewable. *See* 28 U.S.C. § 1447(d) (1994); *Thermatron Prods., Inc. v. Hermansdorfer,* 423 U.S. 336, 342 (1976) (*holiding limited on other grounds, Quackenbush v. Allstate Ins. Co.,* 517 U.S. 706, 711-15 (1996)); *Kolibash v. Committee on Legal Ethics,* 872 F.2d 571, 573 (4th Cir. 1989). The Supreme Court specifically stated that § 1447(d) "prohibits review of all remand orders issued pursuant to § 1447(c) whether erroneous or not." *Thermatron Prods.,* 423 U.S. at 342; *see also In re Lowe,* 102 F.3d 731, 734 (4th Cir. 1996) (holding that once an order of remand is entered, the federal courts no longer have jurisdiction over the case).

Accordingly, we grant the Defendants' motion to dismiss for lack of jurisdiction. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

DISMISSED

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA

Nancy D. Jonas, Plaintiff, -vs- Unisun Insurance Co.; Richardson, and Larson; and Alexander T. Vihil, Defendants.	)	C/A No. 9:99-3869-8AJ Appeal No. 00-1217 **ORDER** FILED JUL 26 2000

On July 7, 2000, the Plaintiff-Appellant filed a motion to amend the caption to reflect that the defendant Alexander T. Vihil should be changed to "Alexander T. Vigil." The motion was served on the other parties; however, no opposition has been filed within 15 days of the filing date of the motion as required by the local rules of this Court. Accordingly, since opposition has not been filed, the motion Plaintiff-Appellant's motion is hereby granted, and it is

ORDERED that the caption in this action be amended to reflect that the defendant Alexander T. Vihil should be changed to "Alexander T. Vigil."

IT IS SO ORDERED.

s/Sol Blatt, Jr.
Senior U.S. District Judge

July 25, 2000
Charleston, S.C.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 00-1217

Nancy D. Jonas,

Plaintiff - Appellant,

versus

UNISUN INSURANCE COMPANY; ORION AUTO INCORPORATED; SVALINA, RICHARDSON & LARSON; ALEXANDER T. VIHIL,

Defendants - Appellees.

ORDER

We have considered Appellant's motion for leave to amend and motion to amend the caption. It is ORDERED that the motion is GRANTED.

For the Court - By Direction
s/PATRICIA S. CONNOR
CLERK

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
October 23, 2000

No. 00-1217
C/A No. 9:99-3869-8AJ

Nancy D. Jonas,
Plaintiff - Appellant,

-vs-

Unisun Insurance Co.; Orion Auto Incorporated; Svalina, Richardson, and Larson; Alexander T. Vihil,
Defendants - Appellees

On Petition for Rehearing and Rehearing En Banc

The appellant's petition for rehearing and rehearing en banc was submitted to this Court. As no member of this Court or the panel requested on poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied.

IT IS ORDERED that the petition for rehearing and rehearing en banc is denied.

For the Court,
s/Patricia S. Connors
CLERK

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
October 31, 2000

No. 00-1217
C/A No. 9:99-3869-8AJ

Jonas v. Unisun Insurance

MANDATE

The judgment of this Court dated 9/20/00 takes effect today.

s/PATRICIA S. CONNON
CLERK

CONSTITUTIONAL PROVISIONS STATUTES AND RULES INVOLVED

Constitution Provisions

Article I, U.S. Constitution

Section 8. The Congress shall have the power to regulate commerce among the several states.

Article III, U.S. Constitution

Section 1. The judicial Power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the Supreme and inferior Courts, shall hold their Offices during good behavior, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their Continuance in Office.

Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their authority;----between citizens of different States; In all cases affecting Ambassadors, other public Ministers and Counsels, and those in which a State shall be Party, the Supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the Supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such regulations as the Congress shall make.

Article VI, U.S. Constitution

Clause 2. This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the

United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any thing in the Constitution or Laws of any State to the Contrary not withstanding.

Clause 3. The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath and Affirmation, to support this Constitution.;----

5th Amendment, U.S. Constitution

No person shall---- be deprived of life, liberty, or property, without due process of law;---

14th Amendment, U.S. Constitution

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Federal Statutes

28 U.S.C. Section 636(a): Each United States magistrate serving under this chapter shall have within the territorial jurisdiction prescribed by his appointment---(1) all powers and duties conferred or imposed upon United States Commissioners by law –

(b)(1): Notwithstanding any provision of law to the contrary---

(A) a judge may designate a magistrate to hear and determine any pretrial matter pending before the court, except a motion for injunctive relief,...to dismiss for failure to state a claim upon which relief can be granted, and to involuntarily dismiss an action. A judge of the court may reconsider any pretrial matter under this subparagraph(A) where it has been shown that the magistrate's order is clearly erroneous or contrary to law.

(C) The magistrate shall file his proposed findings and recommendations under subparagraph (B) with the court and a copy shall forthwith be mailed to all parties. Within ten days after being served with a copy, any party may serve and file written objections to such proposed findings and recommendations as provided by the rules of Court. A judge of the court shall make a de novo determination of those portions of the report or specified findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate. The judge may also receive further evidence or recommit the matter to the magistrate with instructions.

(C)(3) A magistrate may be assigned such additional duties as are not inconsistent with the Constitution and laws of the United States.

(c)(2) 28 U.S.C. Section 636 provides in pertinent part, (b),(C),(3), a magistrate may be assigned such additional duties as are not inconsistent with the Constitution and laws of the United States;

(c)(2) If a magistrate is designated to exercise civil jurisdiction under paragraph (1) of this subsection, the clerk of court shall, at the time the action is filed, notify the parties of the availability of a magistrate to exercise such jurisdiction. The decision of the parties shall be communicated to the clerk of court. Thereafter, either the district court judge or the magistrate may again advise the parties of the availability of the magistrate, but in doing so, shall also advise the parties that they are free to withhold consent without adverse substantive consequences. Rules of court for the reference of civil matters to magistrates shall include procedures to protect the voluntariness of the parties'consent;

(c)(3) Upon entry of judgment in any case referred under paragraph (1) of this subsection, an aggrieved party may

> appeal directly to the appropriate United States court of appeals from the judgment of the magistrate in the same manner as an appeal from any other judgment of a district court. The consent of the parties allows a magistrate designated to exercise civil jurisdiction under paragraph (1) of this subsection to direct the entry of a judgment of the district court in accordance with the Federal Rules of Civil Procedure. Nothing in this paragraph shall be construed as a limitation of any party's right to seek review by the Supreme Court of the United States.

28 U.S.C. Section 1254: Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods: (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

28 U.S.C. Section 1291: The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, except where a direct review may be had in the Supreme Court.

28 U.S.C. Section 1331: Federal Question. The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 U.S.C. Section 1446(c)(4): The United States district court in which such notice is filed shall examine the notice promptly. If it clearly appears on the face of the notice and any exhibits annexed thereto that removal should not be permitted, the court shall make an order for summary remand.

28 U.S.C. Section 1446(d): Promptly after the filing of such notice of removal of a civil action the defendant or defendants shall give written notice thereof to all adverse parties and shall file a copy of the notice with the clerk of such State court, which shall effect the removal and the State court shall proceed no further unless and until the case is remanded.

28 U.S.C. Section 1447(c): A motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction must be made within 30 days after the filing of the notice of removal under section 1446(a). ...

28 U.S.C. Section 1447(d): An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise except that an order remanding a case to the State court from which it was removed pursuant to section 1443 of this title shall be reviewable by appeal or otherwise.

28 U.S.C. Section 2072: Rules are not to affect jurisdiction.

42 U.S.C. Section 1983, *et seq.*: Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission

taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.

42 U.S.C. Section 1983, *et.* seq.
The Rico Statutes,
The Federal Unfair Trade Practices Act

Federal Rules of Civil and Appellate Procedure

Rule 73, Federal Rules of Civil Procedure, FRCP. (c). Appeal. In accordance with Title 28, U.S.C. Section 636(c)(3), appeal from a judgment entered upon the direction of a magistrate judge in proceedings under this rule will lie to the court of appeals as it would from a judgment of the district court;

Rule 3, Federal Rules of Appellate Procedure, FRAP. Appeals from Judgments and Orders of District Courts. An appeal permitted by law as of right from a district court to a court of appeals must be taken by filing a notice of appeal with the clerk of the district court within the time allowed by Rule 4. Rule 4, Federal Rules of Appellate Procedure, FRAP. (a) (1) Except as provided in paragraph (a)(4) of this Rule, in a civil case in which an appeal is permitted by law as of right from a district court to a court of appeals the notice of appeal required by Rule 3 must be filed with the clerk of the district court within 30 days after the date of entry of the judgment or order appealed from;

Rule 5.1, Federal Rules of Appellate Procedure, FRAP. Advisory Committee Notes, 1986 Adoption. When the initial appeal is taken to the district court, the statute provides for a second discretionary appeal to the court of appeals.